Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

PAMELA E. FERNSLER, ET AL.,
Petitioners,

v.

TWO MEN AND A TRUCK
INTERNATIONAL, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a party's failure to properly disclose notice of its intent to call a witness "harmless" so that Fed. R. Civ. P. 37(c)(1) does not require exclusion of that witness merely because the witness "would have offered the same testimony whether the plaintiff had properly disclosed its intent to call him or not" as the United States Court of Appeals for the Sixth Circuit ruled?

2. Is a party's failure to provide proper notice of its intent to call its own attorney "harmless" so that Fed. R. Civ. P. 37(c)(1) does not require exclusion of that witness merely because the opposing party's lead "counsel would have had to cross-examine [the opposing party's attorney about the statements allegedly made to and by the cross-examining attorney and about actions which the cross-examining attorney allegedly promised to take, but did not] whether he testified with or without proper notice" as the United States Court of Appeals for the Sixth Circuit ruled?

3. Is a Trial Court's failure to exclude hearsay that was the only evidence to directly contradict a party's testimony on a critical issue "harmless"?

4. Is a Trial Court's failure to exclude evidence that the Trial Court had already entered a preliminary injunction "harmless"?

5. When a plaintiff contends an action by a defendant breached three different Articles of a contract, does a Trial Court err as a matter of law by not making findings as required by Fed. R. Civ. P. 50(a)(1) on

factual issues with respect to which reasonable persons could reach but one conclusion (which, in this case, was that FLINT did not ever violate two of the Articles in issue) because the failure to make findings led to the possibility the jury did not unanimously agree that a particular Article of the contract at issue was breached (i.e., some jurors might have concluded FLINT breached one Article and other jurors who disagreed on that Article might have concluded FLINT breached a different Article, with the end result being the jurors found FLINT liable because they all agreed that FLINT had breached one or another Article)?

6. When a plaintiff seeks the defendant's profits under 15 U.S.C. § 1117(a) (the Lanham Act) for alleged infringement, can a plaintiff recover the alleged profits without (a) any evidence the defendant ever had any sales - let alone received any money - as a result of the alleged infringement, (b) any evidence the alleged infringer withheld any information during discovery or otherwise, or (c) any evidence the alleged infringer ever made even a single sale as a result of the alleged infringement?

PARTIES TO THE PROCEEDING

The parties whose judgment is sought to be reviewed are: Pamela E. Fernsler, Michigan Moving Company f/k/a Two Men and a Truck/Flint, Inc., P.E.F., Inc., and Two Men and a Truck/International, Inc. which is identified in the caption as Two Men and a Truck International, Inc.

There is no parent or subsidiary company to be listed.

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Two Men and a Truck International, Inc. v. Fernsler, 172 F.3d 49, 1998 WL 898864 (6th Cir. 1998), Sixth Circuit Court of Appeals Case No. 97-1728.

Final judgment was entered June 2, 1997. That judgment was partially based on a jury verdict entered March 17, 1997, which awarded amounts against FLINT and Pam Fernsler and found that PEF had engaged in unfair competition, but did not award any amount against PEF. Other Orders entered and involved in the appeal are: (1) Order granting Plaintiff's motion for enhanced damages entered June 2, 1997; (2) Order granting Plaintiff's motion for attorney fees entered June 2, 1997; (3) Order denying PEF's objections to Plaintiff's proposed judgment after jury trial entered June 13, 1997; (4) Order for Permanent Injunction and Declaratory Judgment entered June 17, 1997; (5) Order granting Plaintiff's motion for judgment on FLINT's counterclaim entered April 1, 1997; (6) Order denying FLINT's motion for reconsideration entered March 27, 1997; and, (7) Order denying Defendants' motions for judgment as a matter of law entered July 2, 1997.

STATEMENT OF JURISDICTION

The opinion by the United States Court of Appeals for the Sixth Circuit was entered on December 17, 1998. The Order denying Petitioners' Motion for Rehearing was entered by the United States Court of Appeals for the Sixth Circuit on April 21, 1999.

This Court has jurisdiction to review on a writ of certiorari the opinion by the United States Court of Appeals for the Sixth Circuit in question pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment 7

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

15 U.S.C. § 1117(a)

(a) When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation under section 43(a), shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 32 and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of

cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may, in its discretion, enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

Federal Rule of Civil Procedure 1

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They will be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Federal Rule of Civil Procedure 26(a)(5)

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes, physical and mental examinations; and requests for admission.

Federal Rule of Civil Procedure 26(e)(1)

A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure

or response is under a duty to supplement or correct the disclosure or response to include the information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Federal Rule of Civil Procedure 37(c)(1)

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. . . .

Federal Rule of Civil Procedure 50(a)(1)

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Federal Rule of Evidence 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Federal Rule of Evidence 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 801(a), (b), and (c)

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Federal Rule of Evidence 802

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

STATEMENT OF THE CASE

FLINT'S AND FERNSLER'S ALLEGED BREACHES

Defendant Michigan Moving Company f/k/a Two Men and a Truck/Flint, Inc. ("FLINT") was a franchisee of Two Men and a Truck/International, Inc. ("TMT") for several years. The franchise contract licensed FLINT to use the mark "Two Men and a Truck" in connection with providing local moving services. Defendant Fernsler personally guaranteed the franchise contract.

Throughout the time that FLINT was a franchisee, TMT directed its franchisees including FLINT to use Ryder trucks for purposes such as to handle additional business and as a substitute truck for any truck being repaired and to assist their customers in renting Ryder trucks for any move which the franchisee could not legally handle with a truck owned by the franchisee because of federal or state laws regulating non-licensed movers. After several years of operating in that fashion, FLINT also began operating a Ryder Truck Rental business whereby customers could obtain a Ryder truck at FLINT's location and FLINT could have Ryder trucks conveniently available for extra business and as a substitute truck.

TMT claimed that FLINT's operation of a Ryder Truck Rental business violated three different Articles of the franchise contract. On September 26, 1994, TMT sent FLINT a Notice of Termination of the franchise contract which granted FLINT the opportunity to cure by ceasing to operate the Ryder Truck Rental business within ten (10) days. TMT claimed that FLINT did not cure and TMT terminated the franchise contract on October 6, 1994. TMT subsequently sued FLINT for breach of the franchise contract and Fernsler

for breach of the guaranty. FLINT counterclaimed for breach of contract that FLINT had timely cured and therefore TMT's termination of the franchise contract was a breach of contract.

From the date TMT filed its Complaint in the fall of 1994 until the day the trial started on February 18, 1997, TMT's lead counsel was Mr. Raymond. From the spring of 1995 through the end of the trial, Defendants' lead counsel was Mr. Huprich. Mr. Huprich was the sole attorney to examine and cross-examine witnesses on behalf of the Defendants during the trial. In January of 1997, TMT first listed Mr. Raymond as a trial witness in a draft of the pretrial order. Defendants moved in limine to exclude Mr. Raymond pursuant to Fed. R. Civ. P. 37(c)(1). The trial court permitted Mr. Raymond to testify even though TMT had also not properly disclosed Mr. Raymond as a witness, Mr. Raymond refused to disclose the substance of his anticipated testimony before he testified, Mr. Raymond apparently intended to testify about what he supposedly said to Mr. Huprich and what Mr. Huprich supposedly said to Mr. Raymond during telephone conversations, and TMT had also not properly disclosed Mr. Huprich as a potential witness.

At trial, TMT's president, Ms. Bergeron, admitted the only thing FLINT had to do to cure was to stop operating the Ryder Truck Rental business. At trial, FLINT's president, Ms. Fernsler, testified to the effect that FLINT had stopped operating the Ryder Truck Rental business within the time the franchise contract allowed to cure. Ms. Fernsler also testified that she had informed Ryder that FLINT could no longer be a Ryder dealer on October 5, 1994, which was before the cure period expired. Thus, a critical fact issue at trial was whether FLINT had stopped operating the Ryder Truck Rental business within the time the franchise contract permitted for a cure.

TMT did not present any evidence from Ryder or any other witness contradicting Ms. Fernsler's testimony that she had informed Ryder that FLINT could no longer be a Ryder dealer on October 5, 1994. TMT also did not present any direct evidence at trial that FLINT ever rented any Ryder trucks on or after October 6, 1994. Instead, TMT presented testimony from Mr. Raymond who testified (1) Mr. Huprich indicated "Ms. Fernsler intended to take action to get out of the Two Men and a Truck franchise system"; (2) "After reading the demand for arbitration, and after the phone call from Mr. Huprich the prior Friday, it was pretty clear to me that they had no intention of signing any addendum, that they were going to get out of the system one way or the other"; (3) he had several phone calls from Mr. Huprich regarding FLINT's attempt to rescind or get out of the system; (4) On October 6, 1994, he called Mr. Huprich on the Ryder situation and informed him FLINT was still selling Ryder services, but Mr. Huprich did not offer an explanation or ever call Mr. Raymond back after Mr. Huprich supposedly said he would talk to Ms. Fernsler about it; and, (5) "The only conversations I had with Mr. Huprich related to Ms. Fernsler getting out of the system. He never expressed any interest in having her stay in the system and continue with Ryder rental truck services." See Transcript of Mr. Raymond's testimony in the Appendix. TMT also introduced (1) a portion of a letter from Ms. Bergeron to Ms. Fernsler which the Court of Appeals agreed was hearsay and which read: "Based on communication directed to our counsel from your attorney, Donald Huprich, last Friday, it is our understanding that you have no intention of complying with the terms of the Two Men and a Truck/franchise agreement dated September 27, 1990 agreement and will continue to violate the agreement as described in our attorney's September 23, 1994 letter to you copy enclosed."; (2) a portion of a letter from Mr. Raymond to Ms. Fernsler which the Court of Appeals agreed was

hearsay and which read: "By independent investigation, my client, Two Men and a Truck/International, Inc. has learned that your client continues to answer the phone as Ryder truck rental or Ryder rental and is representing it continues to display a big Ryder sign in front of the business."; and, (3) testimony that the Trial Court had entered a preliminary injunction against the Defendants.

TMT also presented evidence that Ms. Fernsler had formed Defendant P.E.F., Inc. ("PEF") on October 5, 1994, and intended for PEF to operate a Ryder Rental Truck business. Contrary to the factual conclusion reached by the Court of Appeals that Ms. Fernsler admitted PEF "began operating the Ryder dealership on October 5th"(Two Men and a Truck International, Inc. v. Fernsler, 172 F.3d 49, 1998 WL 898864, at p. 4 (6th Cir. 1998)), there was absolutely no testimony by Ms. Fernsler or any other witness to that effect. Quite to the contrary, Ms. Fernsler testified that PEF "did business, Ryder business, after October 27th 1994" and that the "first rental [through PEF] was around the Third or Fourth of November ... 1994." The reason that PEF did not operate a Ryder Truck Rental business until after October 27, 1994, is apparent from a reading of the Ryder Dealer Agreement between PEF and Ryder Truck Rental, Inc. which was a trial exhibit. Ryder Truck Rental, Inc. did not sign that Ryder Dealer Agreement until October 27, 1994. Since PEF did not operate a Ryder Truck Rental business until well after TMT had already terminated the franchise contract, PEF's action of subsequently operating a Ryder Truck Rental business obviously could not form a basis for justifying TMT's earlier termination of the franchise contract.

TMT's only other evidence which, at best, can only be characterized as circumstantial evidence on the issue of whether FLINT timely stopped operating the Ryder Truck

Rental business consisted of (1) pictures taken several weeks after TMT had terminated the franchise contract of a couple of Ryder trucks parked in FLINT's parking lot which did not prove anything because TMT directed franchisees to use Ryder trucks, (2) pictures taken several weeks after TMT had terminated the franchise contract of a Ryder sign on a building with a number of tenants including FLINT which did not prove any Ryder trucks could actually be rented and which the evidence showed was actually owned by Ryder and which Ryder had not removed apparently because Ryder expected PEF would become an authorized Ryder dealer, and (3) continued payment by Ryder to FLINT of commissions for several months after PEF became a Ryder dealer which Mr. Gary Fernsler explained was a mistake by Ryder's accounting department that was eventually fixed. TMT presented no evidence to the contrary and the evidence showed that FLINT issued checks to PEF for the amount of those payments.

PEF'S ALLEGED UNFAIR COMPETITION

At trial, TMT presented evidence of one and only one time when Ms. Fernsler, who TMT claimed was acting on behalf of PEF, allegedly used the words "Two Men and a Truck" in a telephone conversation with one of TMT's employees many months after the franchise contract was terminated. While the Court of Appeals found TMT "fail[ed] to prove that [PEF] profited from using [TMT's] service mark as required under 15 U.S.C. § 1117(a)", the Court of Appeals affirmed an award of profits against PEF. Id., 1998 WL 898864, at p. 3.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The District Court had federal jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.

ARGUMENT

The United States Constitution guarantees that United States citizens shall not be deprived of property without due process. Fifth Amendment to the United States Constitution. To achieve due process, the Federal Rules of Civil Procedure are designed to prevent trial by ambush and the Federal Rules of Evidence are designed to permit the admission of only that evidence which comports with due process.

FAILURE TO PROPERLY DISCLOSE A WITNESS

To prevent trial by ambush, the Federal Rules of Civil Procedure permit parties to obtain "discovery ... by written interrogatories" (Fed. R. Civ. P. 26(a)(5)), impose an affirmative duty for a party "to supplement ... its disclosures ... if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing" (Fed. R. Civ. P. 26(e)), and provide for a potential sanction on any party who violates those discovery rules by failing to properly disclose any witness or information (Fed. R. Civ. P. 37(c)(1)).

Fed. R. Civ. P. 37(c)(1) specifically provides in pertinent part:

> A party that without substantial justification

> fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.

In this case, even though (1) Defendants had moved in limine to exclude Mr. Raymond (who had not been properly disclosed by TMT) as a witness pursuant to Fed. R. Civ. P. 37(c)(1), (2) Mr. Raymond refused to disclose the substance of his expected testimony, (3) it was apparent that Mr. Raymond intended to testify about oral statements allegedly made to and received from Defendants's lead counsel who would not be able to provide his own rebuttal testimony as he was trying the case, and (4) TMT had also not properly disclosed Mr. Huprich, Defendants' lead counsel, as a potential witness, the Trial Court permitted Mr. Raymond to testify. As noted supra, Mr. Raymond proceeded to provide extremely prejudicial testimony regarding what he allegedly said to Mr. Huprich, what Mr. Huprich allegedly said, what Mr. Huprich allegedly promised to do, and what Mr. Huprich failed to do as allegedly promised. Mr. Raymond's testimony may well have caused the jury to believe that Ms. Fernsler was a liar because, if Mr. Raymond's testimony was believed, Ms. Fernsler was directing Mr. Huprich to take actions completely inconsistent with curing the alleged violation. If the jury believed Ms. Fernsler was a liar, the jury probably did not believe Ms. Fernsler's testimony that FLINT timely stopped operating the Ryder Truck Rental business. If a jury believes a party is a liar, the party's chances of obtaining a favorable and fair verdict are destroyed. See Klonoski v. Mahlab, 156 F.3d 255, 275 (1st Cir. 1998), cert. den. (1999).

The Court of Appeals agreed that TMT "fail[ed] to provide proper notice of its intent to call Raymond". Two

Men and a Truck International, Inc., supra, at p. 5. However, the Court of Appeals held that failure was "harmless" because Mr. Raymond "would have offered the same testimony whether the plaintiff had properly disclosed its intent to call him or not." Id., at p. 5. The Court of Appeals further held the fact Mr. Huprich was therefore forced to cross-examine Mr. Raymond about Mr. Huprich's own alleged statements was still "harmless" because Mr. Huprich "would have had to cross-examine Raymond whether he testified with or without proper notice". Id., at p. 5. Petitioners submit this Court should review those holdings for three reasons.

First, those holdings sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. The Trial Court's decision to permit Mr. Raymond to testify not only resulted in trial by ambush because Mr. Raymond refused to disclose the substance of his expected testimony (see Exhibits "A", "B", and "I" to Defendants' Memorandum in Support of Defendants' Motion in Limine in the Appendix and Mr. Raymond's testimony in the Appendix where he admitted he had not disclosed the substance of his expected testimony), but left Defendants without any ability to even try to counteract the surprise testimony with rebuttal testimony from Mr. Huprich because he was Defendants' lead trial counsel[1]. As a result, Defendants were denied their constitutional right to due

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[1] The inability to call a rebuttal witness is a key reason that experts who are not timely disclosed are routinely excluded from testifying. See, e.g., Trost v. Trek Bicycle Corporation, 162 F.3d 1004 (8th Cir. 1998); Kirstein v. Parks Corporation, 159 F.3d 1065 (7th Cir. 1998), cert. den. (1999).

process[2]. Can anyone reasonably conclude that this was anything but an extreme departure from the accepted and usual course of judicial proceedings? Petitioners submit the answer to that question is an emphatic "no"! No case has been found in which an attorney who was the lead counsel for a party until the day of trial was permitted to testify about statements made to and by the opposing party's lead counsel where those statements related to the issue of liability. The extreme nature of the departure from the accepted and usual course of proceedings is magnified because the improperly disclosed attorney refused to disclose the substance of his testimony before he actually testified.

The failure to disclose the substance of Mr. Raymond's expected testimony also prevented Defendants from seeking discovery of documents that might have been used to cross-examine Mr. Raymond (such as his notes of the alleged conversations and his usual practices related to taking notes of conversations) or documents that were newly available because of Mr. Raymond's waiver of the attorney-client privilege. Although the Sixth Circuit implied that the inability to conduct discovery of such documents might have been harmful, the Sixth Circuit concluded that inability was harmless in this case because "there is no indication in the record that defendants ever made a motion for this discovery or to stay the proceedings until such discovery could be complete[d]." Two Men and a Truck International, Inc.,

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[2] If International had properly disclosed Mr. Raymond and Mr. Huprich as witnesses during discovery, Mr. Huprich could have withdrawn so that he could be ethically permitted to testify in rebuttal to Mr. Raymond's many false statements and other counsel could have handled the extremely time consuming and expensive job of preparing for the lengthy trial.

supra, at p. 5. That reasoning ignores several important facts and considerations. First, without disclosure of Mr. Raymond's intended testimony which the record does show was requested by the interrogatories with respect to all of plaintiff's witnesses, Defendants did not know what documents to seek or what portion of the attorney-client privilege was going to be waived by Mr. Raymond. Second, discovery had expired long before TMT published its witness list so that Defendants were barred from making a motion to compel such discovery or taking such discovery. Third, even if discovery of those documents could have been compelled or obtained so long after discovery had expired, why should Defendants have been forced to file such a motion and obtain discovery of those documents when they had the right to have Mr. Raymond excluded under Fed. R. Civ. P. 37(c)(1)? If the filing of such a motion to compel or obtain discovery is the only appropriate response to the improper disclosure of a witness, then the disclosure rules of Fed. R. Civ. P. 26(a) and 26(e)(1) "could always be disregarded with impunity." See Thibeault v. Square D Co., 960 F.2d 239, 246 (1st Cir. 1992). Furthermore, Fed. R. Civ. P. 37(c)(1) would be made meaningless and therefore cease to have any deterrent effect because the procedure to be followed in every circumstance where a party hides a witness until shortly before trial would be that (1) the opposing party, regardless of any Local Rules or Orders setting deadlines for discovery and motions to compel, would always first have to file a motion to compel or a motion for continuance in order to obtain discovery, (2) the opposing party would then encounter more delay taking such discovery, and (3) the non-disclosed witness would then always be permitted to testify because the non-disclosure would have been rendered "harmless" through the discovery. Such a procedure would also surely open Pandora's Box to a party who seeks to delay trial for as long as possible by allowing that that party to disclose the name of yet another

undisclosed witness after the opposing party had been granted permission to obtain discovery related to the last undisclosed witness, obtained that discovery, and finally been placed back on a trial calendar. Such a procedure would spit in the face of Fed. R. Civ. P. 1.'s requirements that the Federal Rules of Civil Procedure "be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fourth, a stay of the proceedings to compel or obtain that discovery, just like a continuance of proceedings, is not effective in every circumstance to counteract the unfair surprise. See Klonoski, supra, 156 F.3d at 273. "[A] continuance is often ineffectual as a sanction and unfair to both the court and the opposing party." Licciardi v. TIG Ins. Group, Inc., 140 F.3d 357, 366 (1st Cir. 1998). In this case, a stay of the proceedings in order to compel or obtain discovery related to Mr. Raymond would have either been ineffectual because Mr. Huprich would have still been unable to testify in rebuttal to Mr. Raymond or been grossly unfair to the Defendants because they had incurred the expense of having their counsel of choice, Mr. Huprich, prepare for this lengthy trial and, in order for Mr. Huprich to testify, the Defendants would have had to engage another attorney who was not their attorney of choice to act as lead trial counsel and then incurred the expense of that new trial counsel preparing for this lengthy trial[3]. In addition, a motion to compel the

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[3] While Defendants would have been forced to engage other trial counsel if Mr. Raymond had withdrawn from representing International before discovery expired, International had disclosed Mr. Raymond was a witness who was going to testify about his conversations with Mr. Huprich, and International had identified Mr. Huprich as a witness, that did not occur in this case. If it had, Defendants would have never been faced with the possibility of incurring the expense of two different counsel preparing for trial.

production of documents or for the discovery of documents would have likely been ineffective in this case because there is no reason to expect that TMT would have produced any such documents since TMT refused to disclose the substance of Mr. Raymond's expected testimony despite applicable interrogatories requiring disclosure of that information. In light of TMT's willingness to withhold information which obviously existed and which Defendants were entitled to receive, the odds are extremely high that TMT would have likewise been willing to simply claim there were no notes kept by Mr. Raymond of the alleged conversations or any other documents that might be used for impeachment because Defendants would never be able to prove any such documents actually existed.

Second, the Court of Appeals has decided an extremely important question of federal law that has not been, but should be, settled by this Court because the decision could potentially affect at least every single civil case in the Sixth Circuit and perhaps all federal courts. Almost every civil case involves discovery related to potential witnesses. When discovery is sought regarding potential witnesses, the process of achieving justice is dependent on there being truthful and complete disclosures of the potential witnesses and, if requested, truthful and complete disclosures to the extent known by a party as to the knowledge of the potential witnesses. The reality is that at least one party to every case would prefer to not have to disclose all of its witnesses - especially those witnesses who would provide testimony about conversations which the other party might be able to rebut if given sufficient time to be able to present the testimony of the other person to such alleged oral conversations. Fed. R. Civ. P. 37(c)(1) serves as a deterrent to prevent the improper withholding of the names of potential witnesses and the improper withholding of their knowledge. Fed. R. Civ. P.

37(c)(1)'s language does so by prohibiting the use of such non-disclosed witnesses and such non-disclosed information unless there is "substantial justification" for the failure to disclose or the failure to disclose is "harmless". However, Fed. R. Civ. P. 37(c)(1) does not define the term "harmless" or provide any factors to consider in determining whether a failure to disclose is "harmless". The United States Court of Appeals has now ruled a failure to disclose is "harmless" whenever the non-disclosed witness "would have offered the same testimony whether the [party] had properly disclosed its intent to call him or not." Two Men and a Truck International, Inc., supra, at p. 5. If that is the test for determining whether a non-disclosure is "harmless", almost every non-disclosure - if not all non-disclosures - are "harmless" because the testimony of a non-disclosed witness will almost never be dependent on whether he was disclosed or not. The practical result of such a test will be to dramatically tilt the scales of justice in favor of the party who really should lose a particular case. The reason is that a party who believes it should lose will be encouraged to hide its witnesses and information until shortly before trial in reliance on that test. If that test is not applied, that party really hasn't lost anything because its only hope of winning was through the surprise witness or information. In addition, that party gains an issue for appeal if a witness or information is excluded in light of such an easily met test for "harmless". On the other hand, a party who believes it should win is likely to make full disclosure out of a fear that Fed. R. Civ. P. 37(c)(1) might still be construed to exclude a necessary witness or information who or which is not disclosed. Such a result would make a mockery of discovery, create an uneven field for litigants, and encourage parties to engage in trial by ambush. The meaning of the term "harmless", as that term is used in Fed. R. Civ. P. 37(c)(1), or the factors to be considered in determining whether a non-disclosure is

"harmless" therefore needs to be settled by this Court.

Third, the Court of Appeals has entered a decision which appears to be in conflict with the decisions of other United States Courts of Appeals on this important matter and in conflict with the reasoning of this Court's decisions in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam) and United States v. Proctor & Gamble Co., 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958).[4]

In National Hockey League, supra, this Court stressed the policy reasons for enforcing the discovery rules through exclusion of evidence by explaining that exclusion is a necessary sanction "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." Id., at 643. This Court concluded that, if the trial court had only issued a warning to the plaintiffs to comply with all future discovery orders, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts." Id. Thus, enforcement of discovery rules is necessary, this Court concluded, to prevent abuse by future litigants. Id. In Proctor & Gamble, supra, 367 U.S. at 682, this Court ruled that the purpose of the discovery rules is to provide for the "fullest possible" pretrial disclosure of admissible evidence to ensure "a fair contest" and make trials "less a game of blind man's buff [sic]". The

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[4] Each of those cases were decided before the 1993 amendments to the Federal Rules of Civil Procedure which increased the duty of trial courts to exclude undisclosed witnesses and undisclosed information.

Sixth Circuit's Opinion is plainly contrary to the principles set forth in those Opinions by this Court.

The Sixth Circuit's Opinion also appears to be in conflict with the following decisions by the Eighth, Seventh, and First Circuits.

In Trost, supra, the plaintiff identified an expert witness approximately 1&1/2 months after discovery expired and approximately 1&1/2 months before trial. The trial court excluded that expert witness pursuant to Fed. R. Civ. P. 37(c)(1). The United States Court of Appeals for the Eighth Circuit affirmed and held that the failure to timely disclose was not harmless: "[the defendant] would have been significantly prejudiced by the late production of the [expert's] opinion because of lack of time to prepare to refute the evidence at trial." Id., 162 F.3d at 1008 - 9.

In Kirstein, supra, the plaintiffs attempted to submit a report from a second expert (who had not been disclosed during discovery) in responding to the defendants' motion for summary judgment after it became apparent that the plaintiffs' first expert's opinion testimony might be excluded under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The district court excluded the report from the second expert. The United States Court of Appeals for the Seventh Circuit affirmed and held: "If the report were allowed, [a defendant] would no doubt want to depose the second expert and perhaps obtain more expert testimony of its own. The admission of the report, in other words, would cause significant delay, or so the district judge could reasonably believe." Kirstein, supra, 159 F.3d at 1069.

In Salgado v. General Motors Corporation, 150 F.3d

336 (7th Cir. 1998), the plaintiffs submitted two expert witness reports required by Fed. R. Civ. P. 26(a)(2)(B) one business day after discovery expired following two extensions of discovery. The trial court concluded the reports were "conclusory" in nature and therefore insufficient under Fed. R. Civ. P. 26(a)(2)(B). The plaintiffs filed a motion to file a supplemental report from one of the experts which the trial court denied. The exclusion of the expert's testimony left the plaintiffs without a case and the trial court granted summary judgment to the defendant. After the United States Court of Appeals for the Seventh Circuit noted that "Rule 26(a) expert reports must be 'detailed and complete'" and the "report must be complete such that opposing counsel is not forced to depose an expert in order to avoid ambush at trial", the Seventh Circuit affirmed and held the failure to timely submit adequate reports was not harmless because the defendant "had a right to know the conclusions of these particular expert witnesses with respect to this particular accident." Id., 150 F.3d at 742. The Seventh Circuit further held "the sanction of exclusion is automatic unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." Id.

In Klonoski, supra, the trial court permitted the admission of letters which had not been disclosed at any time before they were offered into evidence and which related to a key issue in the case. The United States Court of Appeals for the First Circuit reversed holding that the letters should have been excluded and strongly condemned the trial by ambush which resulted from the admission of the letters. The First Circuit concluded the admission of the letters "was a lot more than 'somewhat ... prejudicial.'" Id., 156 F.3d at 273. The First Circuit reached that conclusion because (1) the failure to produce the letters during the discovery process prevented the plaintiff's attorney from conducting an investigation which

might have uncovered other letters explaining the letters which were admitted or other evidence which demonstrated the admitted letters merely reflected a passing feeling, (2) the plaintiff had already planned his trial strategy based on the evidence available during discovery, and (3) the plaintiff had already executed that trial strategy by presenting his entire case. Id.

HEARSAY

The Trial Court admitted a portion of a letter from Ms. Bergeron to Ms. Fernsler which the Court of Appeals agreed was hearsay (Two Men and a Truck International, Inc., supra, at p. 4) and which read: "Based on communication directed to our counsel from your attorney, Donald Huprich, last Friday, it is our understanding that you have no intention of complying with the terms of the Two Men and a Truck/franchise agreement dated September 27, 1990 agreement and will continue to violate the agreement as described in our attorney's September 23, 1994 letter to you copy enclosed." The Trial Court also admitted a portion of a letter from Mr. Raymond to Ms. Fernsler which the Court of Appeals agreed was hearsay (Id.) and which read: "By independent investigation, my client, Two Men and a Truck/International, Inc. has learned that your client continues to answer the phone as Ryder truck rental or Ryder rental and is representing it continues to display a big Ryder sign in front of the business."

Since those portions of those letters were hearsay under F.R.E. 801 and therefore inadmissible under F.R.E. 802, they should have not been admitted. While the Court of Appeals agreed hearsay was admitted, the Court of Appeals did not find "any harm to the defendants' case because there was sufficient independently admissible evidence to support

the breach of contract verdict. Specifically, Fernsler's admission that P.E.F. began operating the Ryder dealership on October 5th is alone highly probative of the defendants' liability." Id.

Petitioners submit the Court of Appeals was erroneous in finding any such admission because it simply does not exist and, in fact, is directly contrary to all of the evidence as to the date when PEF began operating a Ryder dealership.

If Mr. Raymond had been excluded as a witness as he should have been and if both items of hearsay had been excluded, the jury would have heard no testimony to the effect that FLINT did not intend to cure and no testimony that a representative of FLINT was allegedly answering any telephone with the words "Ryder" on October 6, 1994, or allegedly representing that FLINT's Ryder dealership could be found by looking for the Ryder sign on October 6, 1994. If Mr. Raymond and the hearsay had been excluded, TMT's case would have been without any direct evidence to contradict Ms. Fernsler and been reduced to three pieces of evidence which, at the best for TMT, can only be characterized as extremely weak circumstantial evidence. Clearly such evidence was therefore prejudicial to Defendants.

THE PRELIMINARY INJUNCTION

Defendants moved in limine to exclude "[a]ny evidence that a preliminary injunction was entered ... on the grounds of (a) relevancy (F.R.E. 402) and (b) unfair prejudice outweighing probative value (F.R.E. 403)." Defendants' counsel explained the two independent grounds the motion should have been granted as follows: (1) the preliminary injunction was not relevant because it was preliminary and the

jury is to be the finder of fact and (2) "If the jury's told about a preliminary injunction having been entered, then the jury's quite likely to draw a conclusion that Your Honor's already looked at ... all of the evidence and reached the conclusion that Defendants are in the wrong. And that would, I think, unfairly prejudice the Defendants ... ." The Trial Court denied the motion. Although the Sixth Circuit did not expressly state that evidence of the preliminary injunction should have been inadmissible, that is implied by the Sixth Circuit's Opinion since the Sixth Circuit analyzed that issue in terms of whether the admission of evidence of the preliminary injunction caused any harm. The Sixth Circuit did not find "any harm to the defendants' case because there was sufficient independently admissible evidence to support the breach of contract verdict. Specifically, Fernsler's admission that P.E.F. began operating the Ryder dealership on October 5th is alone highly probative of the defendants' liability." Id.

As noted supra, the finding of such an alleged admission is erroneous. Since it is erroneous, there can be no doubt the unfair prejudice created by admission of evidence that the Trial Court had already ruled in favor of TMT by granting a preliminary injunction outweighed any probative value. To hold otherwise would cause litigants who lost any portion of a preliminary injunction hearing to be forevermore deprived of their right to a fair and impartial jury trial under the Fifth and Seventh Amendments to the U.S. Constitution because juries will be permitted to know the judge already determined who the judge thought was in the right. McCoy v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981). Regardless of whether Mr. Raymond was permitted to testify and the hearsay was admitted, there cannot be any doubt that any party is extremely prejudiced when a judge lets a jury know the judge has already ruled in favor of the other party. It

seems inconceivable for there to be any conclusion except that the Trial Court abused its discretion in admitting such evidence to come before the jury.

THE FAILURE TO MAKE FINDINGS

As a matter of law, the Trial Court was required to make findings on factual issues with respect to which reasonable persons could reach but one conclusion. The Advisory Committee's Notes to Fed. R. Civ. P. 50(a) indicate the 1991 revision "aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment." To comply with that Constitutional responsibility, Rule 50(a)(1) also imposes a duty on trial courts to determine some factual issues. "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue, the court may determine the issue against that party ..." Fed. R. Civ. P. 50(a)(1). That "standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury ..." Advisory Committee Note to 1991 amendments to Rule 50(a)(1).

Petitioners contend the Trial Court committed reversible error by submitting factual issues to the jury on which the Trial Court should have made specific findings. Rowland v. Mad River Local School District, 730 F.2d 444, 450 (6th Cir. 1984) (It is "plain error" for a judge to require a jury to make findings on an issue which the trial judge recognized as having been the subject of no proof). In accordance with the Advisory Committee's Notes, such

findings are part of a trial court's responsibility to assure the fidelity of its judgment to the controlling law which is "a responsibility imposed by the Due Process Clause of the Fifth Amendment." Thus, the failure to make any required findings violates constitutional rights. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. State of California, 38 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705 (1967), reh. den. 1967. Even non-constitutional error is prejudicial if the error had a "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect. Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946). "But if one cannot say, with fair assurance, after pondering all that happened ... that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." Id.

Petitioners submit that, at the very least, the Trial Court should have made the following findings: (1) FLINT never violated Article III(4) of the franchise contract as TMT argued to the jury and (2) FLINT never violated Article III(7) of the franchise contract as TMT argued to the jury.

The potentially relevant portions of Article III(4) read: "It is specifically understood and agreed that the Franchisee shall use Franchisor's trade names, marks and logos licensed by this Agreement only in such ways as are permitted by the Franchisor in its operations manual or other written notice ... [T]he Franchisee shall not use its name or any other name not previously approved in writing by the Franchisor in connection with any of Franchisor's marks, trade names or logos." FLINT's counsel reviewed the plain meaning of the first sentence of Article III(4) with the Trial Court as follows:

"That sentence restricts the way in which someone uses the words 'Two Men and a Truck'. It does not restrict whether someone uses some other words such as 'Ryder Rental Truck'." There was no evidence FLINT ever used "Two Men and a Truck" or any logo owned by Plaintiff contrary to a way permitted in Plaintiff's operations manual or another writing. In fact, TMT did not show what was and was not "permitted by ... [the] operations manual" because TMT did not attempt to have the manual admitted as evidence.

With respect to the last sentence of Article III(4), FLINT's counsel explained to the Court: "the evidence showed ... it's perfectly acceptable for people to be wearing a ... uniform or a scarf or a hat or a jacket which said Two Men and a Truck on it ... while driving a rented Ryder Truck for somebody." Ms. Sheets, the President of TMT when the franchise contract was signed and Chairman of the Board of Directors of TMT and owner of her own individual franchise at the time of trial, admitted franchisees drove trucks saying Ryder to customers' homes, she used Ryder trucks in her business, and her employees wore uniforms and/or insignia displaying the words "Two Men and a Truck" when driving or using Ryder trucks. Ms. Sheets' admissions conclusively proved that using "Two Men and a Truck" in conjunction with "Ryder" was permitted by TMT. There was also no evidence FLINT ever mixed together the words "Two Men and a Truck" and "Ryder". An issue on Article III(4) should never have been submitted to the jury because reasonable persons could reach but one conclusion - FLINT never violated Article III(4).

Similarly, FLINT's operation of a Ryder Truck Rental business never violated Article III(7) of the franchise contract. Article III(7) reads: "No part of the Franchisor's proprietary marks and trade names nor any words similar thereto shall,

without the prior written approval of the Franchisor, be included in any trade name utilized by the Franchisee or by any corporation, partnership or other entity in which the Franchisee may, at any time, have any direct or indirect interest, provided that where required or permitted by applicable law, the Franchisee may register himself as carrying on business using the name indicated in Section C of Exhibit 1 as an assumed or fictitious name." TMT never claimed that use of "Two Men and a Truck" in FLINT's trade name prior to October 6, 1994, was a violation of the franchise contract. Instead, TMT solely accused FLINT of violating Article III(7) by operating a Ryder Truck Rental business. As TMT only gave notice to FLINT that TMT alleged FLINT's operation of a Ryder Truck Rental business was a violation of Article III(7), TMT had to prove Plaintiff had a proprietary interest in the trade name "Ryder". As TMT did not so prove, FLINT's use of "Ryder" could not be found to violate Article III(7). It is also obvious that TMT did not have any proprietary interest in the trade name "Ryder" because this lawsuit would have never occurred if TMT owned "Ryder". The issue of whether Article III(7) was violated should never have been submitted to the jury because reasonable persons could reach but one conclusion - using the trade name "Ryder" could not violate the plain meaning of Article III(7)[5].

The Court of Appeals should have reversed and remanded the breach of contract claims for a new trial because of the prejudice created by the Trial Court failing to make

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[5] The Court of Appeals quite surprisingly and quite erroneously found that PEF's intention to use Ryder was the use of International's trade name. Two Men and a Truck International, Inc., supra, at p. 3.

findings as required by Fed. R. Civ. P. 50(a)(1). For example, since the issue of whether Article III(4) was violated was submitted erroneously to the jury, the jury may have found that neither Article III(7) nor Article II(3) was violated, but erroneously found that Article III(4) was violated. In that case, if the Trial Court had made the required factual finding on Article III(4), the verdict would have been different. Alternatively, some jurors might have found that only Article III(4) was violated and the rest of the jurors might have found that only Article III(7) was violated. In that case, if the Trial Court had made the required factual finding on either Article III(4) or Article III(7), the verdict would have been different. Under the constitutional error test for prejudice, such errors were clearly not harmless beyond a reasonable doubt. Under the non-constitutional error test for prejudice, Petitioners submit such errors had a "substantial influence" on the outcome or at least causes "grave doubt" as to whether it had such effect. Certainly, one cannot say, with fair assurance, after pondering all that happened in this case, that the judgment was not substantially swayed by the error. Petitioners therefore submit it is impossible to conclude that substantial rights were not affected.

NO PROOF OF ANY SALES BY PEF

The Sixth Circuit's Opinion recognized that TMT "fail[ed] to prove that [PEF] profited from using its service mark as required under 15 U.S.C. § 1117(a)." Id. Although the Sixth Circuit implicitly recognized that TMT failed to prove PEF generated any sales from its alleged one-time use of "Two Men and a Truck" which 15 U.S.C. § 1117(a) requires the plaintiff to prove in order to recover any profits, the Sixth Court justified an award of profits against PEF because the District Court noted "the defendants were hardly cooperative in disclosing the profits they made from using the

plaintiff's mark." Id. While the Petitioners respectfully disagree with the District Court's statement, there is absolutely no basis for the District Court's statement to apply to PEF because there is nothing in the record which indicates TMT ever sought any discovery from PEF regarding its sales or PEF withheld any records. Furthermore, TMT made no attempt at trial to introduce any evidence - not even an estimate - of any sales that PEF allegedly generated from its alleged one-time use.

Since TMT did not meet its burden of proving PEF's sales and there is nothing in the record which indicates TMT ever sought any discovery from PEF regarding its sales or PEF withheld any records, 15 U.S.C. § 1117(a) simply does not permit any recovery from PEF based on "profits." No case has been found where a recovery of profits has ever been permitted under these circumstances. The Court of Appeals therefore sanctioned an extreme departure from the accepted and usual course of proceedings involving an award of profits under 15 U.S.C. § 1117(a).

CONCLUSION

The Petitioners therefore respectfully request the Supreme Court of the United States of America to grant this Petition.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: December 17, 1998]

No. 97-1728

On Appeal From The United States District Court
For The Eastern District Of Michigan

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

TWO MEN AND A TRUCK INTERNATIONAL, INC., *Plaintiff-Appellee*,	)
v.	)
PAMELA E. FERNSLER, ET AL., *Defendants-Appellants*.	)

Before: MERRITT, COLE AND FARRIS*, Circuit Judges

* The Honorable Jerome Farris, Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

MERRITT, Circuit Judge. The defendants appeal the District Court's judgment following a jury verdict for breach of contract and unfair competition. The defendants FLINT, Inc. and Pam Fernsler, FLINT's officer and sole shareholder, operated a franchise of the plaintiff, Two Men and A Truck International, Inc. The defendant P.E.F., Inc. was incorporated by Fernsler and financed by FLINT. A jury found that Fernsler and FLINT breached the franchise contract by operating a Ryder Truck Rental business in conjunction with their franchise. The jury also found that the defendants were liable for unfair competition because of their continued use of the plaintiff's service mark after the franchise contract was terminated. On appeal, the defendants argue that the evidence did not support the judgment against FLINT and Fernsler for breach of contract and against P.E.F. for unfair competition. The defendants also argue that the District Court committed several evidentiary errors that prejudiced their case. We affirm the judgment of the District Court.

I. FACTS

This case grows out of a 1990 franchise contract between the plaintiff and FLINT. The contract authorized FLINT to use the plaintiff's "Two Men and A Truck" service mark and business operating system in connection with FLINT's moving business in Genessee County, Michigan. In February 1994, Fernsler signed a Ryder Truck Dealer agreement as "Two Men and a Truck". The plaintiff did not know of this agreement at the time. In May 1994, Fernsler declared in a local newspaper article that FLINT's "Two Men and a Truck is a new Ryder Truck Rental Dealer" and that "Two Men and a Truck will rent Ryder trucks locally." Soon

after the article, the plaintiff sent a letter to Fernsler stating that FLINT's operation of a Ryder dealership violated three sections of their 1990 contract. The letter required FLINT to cease its Ryder operation. Subsequently, the plaintiff suggested that FLINT may be able to operate a Ryder dealership as a "test-market" for possible use throughout the plaintiff's entire franchise system. The plaintiff's president, Melanie Bergeron, set up a meeting with Fernsler to prepare a contract addendum to make FLINT a Ryder test-market. At Bergeron's meeting with Fernsler in June 1994, the plaintiff claims that Fernsler agreed to sign an addendum. Subsequently, the plaintiff sent Fernsler a letter looking forward to the Ryder test-market once Fernsler signed the "new agreement." The plaintiff sent Fernsler a test-market addendum on August 10, 1994 complete with a cover letter asking her to sign the addendum or to call the plaintiff if she had any questions. The plaintiff never heard back from Fernsler in the following weeks. In early September, Bergeron reached Fernsler by telephone, and Fernsler informed Bergeron that her attorneys had told her not to talk to the plaintiff.

On September 23, 1994, the plaintiff's counsel, Steven Raymond, sent a letter to Fernsler informing her that FLINT's Ryder operation was violating the 1990 franchise contract. On the same day that the plaintiff sent this letter to Fernsler, FLINT's counsel coincidentally called Raymond and informed him that FLINT wanted out of the plaintiff's franchise system. On September 16, 1994, the plaintiff sent FLINT a Notice of Termination of the franchise contract subject to FLINT's failure to cure its violation by ceasing the Ryder dealership. The 1990 contract provided that a franchisee will have the "right to cure, correct and remedy the

default allowing the termination within the ten calendar days immediately following the date upon which the Notice of Termination was served upon the franchisee."

On October 5, 1994, Raymond received a letter from FLINT's counsel stating that FLINT had written to Ryder and advised Ryder that FLINT could no longer operate its dealership. On that same day, Fernsler incorporated a new corporation, P.E.F., Inc. At trial, Fernsler testified that P.E.F. operated a Ryder dealership at the location of her Two Men and A Truck franchise beginning on October 5th. Fernsler also admitted that FLINT helped finance P.E.F. and that P.E.F. did not pay rent for its occupation of the building shared with FLINT. On October 6th, the plaintiff allegedly discovered that there was a Ryder sign still on the property of FLINT's Two Men and A Truck franchise and that the defendants continued to answer the phone as "Ryder". The plaintiff's proof of this discovery at trial was limited to allegations contained in an October 6th fax sent by Raymond to one of FLINT's attorneys. Later that day, Raymond spoke personally with defendants' counsel who did not offer any explanation for the presence of the Ryder signs or phone greeting. The plaintiff discontinued providing services to FLINT after October 6, 1994. Fernsler admitted at trial that FLINT continued to use the plaintiff's service mark until the District Court entered a preliminary injunction in April 10, 1995.

The plaintiff filed this action in November 1994. The plaintiff's complaint alleged that the defendants breached the 1990 franchise agreement under Michigan law and that they had unlawfully used the plaintiff's service mark and engaged in unfair competition under the Lanham Act, 15 U.S.C.

§ 1125(a). The plaintiff later dismissed the breach of contract claim against P.E.F. The defendants filed a counterclaim against the plaintiff alleging that the plaintiff wrongfully terminated the franchise contract.

On February 18, 1997, the District Court granted the defendants' Motion in Limine to exclude evidence regarding legal settlements between the plaintiff and other franchisees. At trial, though, Bergeron testified on cross-examination that the plaintiff had entered into settlements with two other franchisees who had threatened to leave the franchise system. The defendants' Motion in Limine also requested exclusion of any evidence that the District Court issued the April 1995 preliminary injunction. The District Court denied this request.

The District Court conducted a jury trial in this matter beginning on February 18, 1997. During trial, the defendants objected to the admission of hearsay contained in the plaintiff's September 26, 1994 Termination Notice and October 6, 1994 fax. The District Court overruled the defendants' objections and admitted the evidence under the business records exception to the hearsay rule without requiring any foundation. The District Court also denied the defendants' motion to preclude Raymond from testifying for the plaintiff because the plaintiff had failed to provide proper notice of its intent to call him.

The plaintiff filed a motion for directed verdict on the defendants' breach of contract counterclaim under Rule 50 of the Federal Rules of Civil Procedure. The District Court granted the plaintiff's motion. The District Court denied the defendants' motion for directed verdict on the plaintiff's

breach of contract and unfair competition claims. The District Court entered final judgment against the defendants on June 2, 1997 partly based on a jury verdict entered March 17, 1997, which awarded $119,763.28 against FLINT and Fernsler for breach of contract and $15,000 against FLINT, Fernsler and P.E.F. for unfair competition. The District Court doubled the unfair competition judgment to $30,000 as authorized under 15 U.S.C. § 1117(a) because the defendant had impeded the calculation of actual damages.

II. ANALYSIS

The District Court's judgment must be affirmed because a reasonable juror could easily find for the plaintiff when the evidence is viewed in its most favorable light. The evidence is sufficient to prove that P.E.F.'s use of the plaintiff's service mark created a "likelihood of confusion" in violation of 15 U.S.C. § 1125(a). In *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1190 (6th Cir. 1997), the Court held that a franchisee's continued unauthorized use of a franchisor's trademark establishes a likelihood of confusion under 15 U.S.C. § 1125(a). In this case, the plaintiff presented evidence that Fernsler answered P.E.F.'s phone as "Two Men and A Truck." This was an unauthorized use of the plaintiff's service mark by P.E.F. Though P.E.F. was not a franchisee of the plaintiff, it was directly associated with FLINT and Fernsler. The Court thus affirms the District Court's judgment against P.E.F., including the damages award. The plaintiff did fail to prove that the defendants profited from using its service mark as required under 15 U.S.C. § 1117(a). As the District Court noted, however, the defendants were hardly cooperative in disclosing the profits that they made from using the plaintiff's mark.

The evidence is also sufficient to support the jury's verdict against FLINT and Fernsler for breach of contract. The general verdict in this case found FLINT and Fernsler liable without stating the specific sections of the contract which they violated. Article III(4) of the contract provides that a "[f]ranchisee shall not use [any] name not previously approved in writing by the Franchisor in connection with any of the Franchisor's marks." The evidence shows that the defendants used the Ryder name in connection with the Two Men and A Truck mark. For instance, Fernsler signed a Ryder Dealer Agreement as "Two Men and A Truck" and later stated in a local newspaper that "Two Men and A Truck will rent Ryder trucks locally." Though there was evidence that other franchisees of the plaintiff had used Ryder trucks before in connection with their franchise business, these uses were always temporary and qualitatively different from the defendants' use, which was geared toward establishing a Ryder business in the franchise itself.

In the alternative, the defendants argue that they cured their breach within the time allowed by the contract. At trial, however, Fernsler testified that P.E.F. had immediate plans to operate a Ryder business after the defendants informed Ryder on October 5th that FLINT could not continue the dealership. The defendants argue that this is why they kept the Ryder sign on their property even though FLINT had allegedly terminated its relationship with Ryder. In light of the defendants' admission that P.E.F. was taking over the Ryder dealership, the jury could certainly find that the defendants were still liable for breaching Article III(7) of the contract. Article III(7) provides that the plaintiff's trade name may not be used "in any trade name utilized by the Franchisee or by any corporation, partnership or other entity in which the

Franchisee may, at any time, have any direct or indirect interest." The defendants had a direct interest in P.E.F. because of FLINT's role in financing P.E.F. and paying its rent.

The defendants also argue that the plaintiff prematurely terminated the contract's cure period. At trial, Raymond admitted that the contract was in fact terminated one day early on October 6th, though the defendants offer no evidence that they were aware of this premature termination at the time or that it prohibited them from taking additional steps to cure their breach. Raymond's October 6th fax, informing the defendants that their Ryder letter was inadequate, did not state, as the defendants claim it did, that they "had not timely cured." Raymond's letter simply stated that they had not yet cured. Moreover, the defendants argue that they were satisfied that their October 5th letter to Ryder was sufficient to cure their breach, so having the additional day of October 6th would not have helped them any further. The defendants' counsel offered no indication that they were still attempting to cure their breach on October 6th after they received the plaintiff's notice that their October 5th letter to Ryder was insufficient.

Finally, the defendants argue that the District Court committed "plain error" by submitting the case to the jury when there was "clear and obvious" proof that the defendants had oral and written consent from the plaintiff to operate a Ryder business within its Two Men and A Truck franchise. The record shows, however, that the plaintiff required the defendants first to sign an addendum to the franchise contract before they could operate a Ryder "test market." Soon after learning of the defendant's Ryder operation, Bergeron

informed Fernsler that they would have a meeting to prepare the addendum. At the subsequent meeting, Fernsler agreed to sign an addendum. Finally, Bergeron sent Fernsler a follow-up letter after the meeting in which she said that the plaintiff's lawyers were working on the addendum and that the plaintiff looked forward to the Ryder test-market once the defendants signed the "new agreement." It is undisputed that the defendants never signed a contract addendum. Though it is conceivable that the defendants might have thought that the addendum was meant simply to confirm the oral consent that they had received from the plaintiff, a jury could reasonably infer from the evidence that the addendum was a necessary condition to the defendants' operation of a Ryder business.

Since the defendants breached the franchise contract by operating a Ryder dealership, the plaintiff lawfully terminated the franchise contract. We thus uphold the District Court's judgment for the plaintiff on the defendants' counter-claim for unlawful termination of the contract.

The defendants also argue that the District Court committed reversible error with respect to numerous evidentiary issues. None of the evidentiary rulings at issue, however, caused any harm to the defendants' case because there was sufficient independently admissible evidence to support the breach of contract verdict. Specifically, Fernsler's admission that P.E.F. began operating the Ryder dealership on October 5th is alone highly probative of the defendants' liability. The District Court's admission of the hearsay and evidence of the prior preliminary injunction could not have significantly strengthened a case that was already strong. The same is true of Bergeron's testimony on the plaintiff's settlements with other franchisees, which was

forbidden by a Court order. We also note that Bergeron's testimony was invited by the defendant's cross-examination. As the District Court remarked, defendants' counsel had "riled the witness" and Bergeron was simply "expanding on what [counsel] was pressing her with."

Lastly, the District Court did not err by allowing the plaintiff's counsel to testify as a witness. The plaintiff's failure to provide proper notice of its intent to call Raymond was "harmless", so Raymond was not prohibited from testifying by Rule 37(c)(1) of the Federal Rules of Civil Procedure. The defendants' main concern is that Raymond testified at all and not that he testified without proper disclosure by the plaintiff. The defendants, for example, argue that Raymond offered highly prejudicial testimony, but he would have offered the same testimony whether the plaintiff had properly disclosed its intent to call him or not. The defendants also complain that their counsel was forced to cross-examine Raymond about his own prior statements to Raymond. Again, defendants' counsel would have had to cross-examine Raymond whether he testified with or without proper notice from the plaintiff. The defendants' best argument is that they did not conduct discovery of documents that might be used to cross-examine Raymond or that were newly admissible because of Raymond's waiver of the attorney-client privilege. However, there is no indication in the record that the defendants ever made a motion for this discovery or to stay the proceedings until such discovery could be complete. With more than a month between the plaintiff's publication of its witness list with Raymond on it and the start of trial, the defendants had ample time to make either of these motions. Finally, the defendants argue that they were prejudiced by Raymond's failure to disclose the

details of his testimony, particularly his recollection of conversations with defendants' counsel. However, the defendants do not establish that Raymond was ever required to provide these details.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the District Court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: April 21, 1999]

TWO MEN AND A TRUCK/INTERNATIONAL, INC. formerly known as Two Men and a Truck/USA, Inc., a Michigan corporation,
Plaintiff-Appellee,

v.

PAMELA E. FERNSLER; MICHIGAN MOVING COMPANY, formerly known as Two Men and a Truck of Flint, Inc.; P.E.F., Inc.,
Defendants-Appellants.

BEFORE: MERRITT, COLE, and FARRIS*, Circuit Judges.

* The Honorable Jerome Farris, Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed: February 4, 1997]

TWO MEN AND A TRUCK/INTERNATIONAL, INC., a Michigan corporation, f/k/a TWO MEN AND A TRUCK/USA, INC., *Plaintiff*,	)
v.	)
PAMELA E. FERNSLER, TWO MEN AND A TRUCK OF FLINT, INC. AND P.E.F., INC., a Michigan corporation, *Defendants*.	)

DEFENDANTS' MOTION IN LIMINE NOS. 1-14

COME NOW Defendants Pamela E. Fernsler ("Fernsler"), Michigan Moving Company f/k/a Two Men and a Truck of Flint, Inc. ("TMT/Flint"), and P.E.F., Inc. ("PEF") (hereinafter also collectively referenced as "Defendants") and file their Motion in Limine Nos. 1-14 which moves the Court for an Order granting the following requests:

. . .

2. Plaintiff's counsel, Steven M. Raymond, should be excluded as a witness pursuant to Fed. R. Civ. P. 37(c)(1).

. . .

4. Any evidence that a preliminary injunction was entered or sought in this case should be excluded on the grounds of (a) relevancy (F.R.E. 402) and (b) unfair prejudice outweighing probative value (F.R.E. 403).

8. Plaintiff should be prohibited from calling Don C. Huprich as a witness pursuant to Fed. R. Civ. P. 37(c)(1).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TWO MEN AND A TRUCK/INTERNATIONAL, INC., a Michigan corporation, f/k/a TWO MEN AND A TRUCK/USA, INC., *Plaintiff*,	)
v.	)
PAMELA E. FERNSLER, TWO MEN AND A TRUCK OF FLINT, INC. AND P.E.F., INC., a Michigan corporation, *Defendants*.	)

DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE NOS. 1-14

COME NOW Defendants Pamela E. Fernsler ("Fernsler"), Michigan Moving Company f/k/a Two Men and a Truck of Flint, Inc. ("TMT/Flint"), and P.E.F., Inc. ("PEF") (hereinafter also collectively referenced as "Defendants") and file their Memorandum in Support of Defendants' Motion in Limine Nos. 1-14 as follows:

. . .

2. Plaintiff's counsel, Steven M. Raymond, should be excluded as a witness.[1]

On October 16, 1995, Defendants served Defendants' First Set of Interrogatories to Plaintiff. See Exhibit "A". A number of the interrogatories requested Plaintiff to identify potential witnesses. See, e.g., Interrogatory Nos. 4 (which relates back to, inter alie, Interrogatory Nos. 1, 2, and 3), 10, 14, and 15. In particular, Interrogatory No. 10, requested from Plaintiff to "[i]dentify all witnesses whom Plaintiff will or may have present at trial including expert and impeachment witnesses." In response to those interrogatories, Plaintiff served Plaintiff's Response to Defendants' First Set of Interrogatories. See Exhibit "B". Plaintiff's counsel was never identified as a potential witness in Plaintiff's Response to Defendants' First Set of Interrogatories. To date, Plaintiff's Response to Defendants' First Set of Interrogatories to Defendants has not been supplemented.

On or about January 19, 1996, Plaintiff filed its Motion for Partial Summary Judgment and Plaintiff's Brief in Support of Motion for Summary Judgment and in Response to Defendants' Motion for Partial Summary Judgment. The Affidavit of Steven M. Raymond was attached to that Brief as Exhibit "M". See Exhibit "C". On February 7, 1996, Defendants' counsel, Mr. Huprich sent a letter to Mr. Raymond regarding that Affidavit (and an Affidavit which had been filed in a case pending in the Western District of

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[1] Mr. Raymond may file his affidavit in support of a motion for attorney's fees pursuant to Fed. R. Civ. P. 54(3)(2) after trial if Plaintiff is entitled to recover any attorney's fees.

Michigan). See Exhibit "D". In that letter, Mr. Huprich wrote:

> In light of your Affidavits which you have filed in the above-referenced cases which provide your testimony on material issues that are in dispute, you are currently appearing before the Courts in the dual capacity of a material witness and an attorney representing the Plaintiff. I am certain that is not permitted.
>
> You must either immediately withdraw your Affidavits in the above-referenced cases or you must withdraw as counsel of record. Please advise me by noon tomorrow as to which you are going to do. If I do not hear from you by then, I will act on the assumption that you plan to continue to be a witness and counsel of record.

Mr. Raymond did not respond to that letter. Approximately one month later, Mr. Huprich confirmed via a letter dated March 8, 1996, to Mr. Raymond that there had been no response to the letter dated February 7, 1996. See Exhibit "E". In Mr. Huprich's letter dated March 8, 1996, he wrote: "I want to confirm that you have never responded to my letter dated February 7, 1996, a copy of which is enclosed. If I am mistaken, please fax me a copy of your response today. Otherwise, I will have to bring this matter to the Court's attention at the hearing because it is my understanding that an attorney is not permitted to be a witness on a material disputed fact and counsel of record." Mr.

Huprich did not receive a written response to his letter dated March 8, 1996, and does not believe that he ever received any oral response to either the letter dated February 7, 1996, or March 8, 1996, until January 1997, in connection with preparing the Pretrial Order.

On March 11, 1996, a hearing was held on Plaintiff's Motion for Partial Summary Judgment and Defendants' earlier filed Defendants' Motion for Partial Summary Judgment. During that hearing, Plaintiff's counsel never mentioned to Mr. Raymond's Affidavit or any of the facts to which Mr. Raymond had sworn he had personal knowledge in that Affidavit. See Exhibit "F". Since Plaintiff's counsel did not mentioned Mr. Raymond's Affidavit or any material disputed facts set forth in that Affidavit during the hearing, but Mr. Raymond continued forward as Plaintiff's counsel of record, Defendants' counsel assumed that Mr. Raymond had decided to remain as counsel of record and to not be a witness and Defendants' counsel did not bring the potential conflict to the Court's attention at that hearing. Defendants' counsel's belief that Mr. Raymond had decided by the time of the hearing on March 11, 1996, that Mr. Raymond would not be a witness was confirmed by Mr. Raymond at the pretrial conference on January 15, 1997. During that pretrial conference, Mr. Raymond represented to the Court he did not decide he was a witness until some unspecified date after the Court denied Plaintiff's Motion for Partial Summary Judgment (i.e., some time after the hearing concluded on March 11, 1996, through January 8, 1997, when Plaintiff's initial draft of the Pretrial Order disclosed that Plaintiff intended to call Mr. Raymond as a witness). See Exhibit "G". Plaintiff never informed

Defendants of that decision for Mr. Raymond to be a witness for Plaintiff at any time after the hearing on March 11, 1996, until January 8, 1997.

Under Fed. R. Civ. P. 26(a)(5), a party may obtain discovery by written interrogatories. When there has been a failure to disclose information required by Rule 26(a), Fed. R. Civ. P. 37(c)(1) provides: "A party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence at a trial . . . any witness not so disclosed."

The Sixth Circuit has recently reaffirmed that four factors are to be considered in connection with imposing any sanction under Rule 37: "The first factor is whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; the second factor is whether the adversary was prejudiced by the party's failure to cooperate in discovery; the third factor is whether the party was warned that failure to cooperate could lead to sanctions; and the fourth factor in regard to dismissal is whether less drastic sanctions were first imposed or considered." Freeland v. Amigo, __ F.3d __, 1997 WL 7281 (6th Cir. 1997), p. 6[2]. In that case, the Sixth Circuit reversed the Trial Court's exclusion of plaintiff's expert witness from testifying at trial which resulted in summary judgment being granted to defendant in a medical malpractice action because such an action is dependent upon there being expert testimony.

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[2] For the convenience of the Court, a copy of that January 10, 1997, decision is attached as Exhibit "H".

In this case, it is clear that Plaintiff failed to timely disclose that Mr. Raymond would be a witness.

The first factor becomes particularly important if the effect of excluding a witness would result in the most extreme sanction of denying a party its day in court. Excluding Mr. Raymond from testifying would not deny Plaintiff its day in court for two reasons. First and most importantly, Mr. Raymond has recently written "the testimony I intend to provide that cannot be disputed is what I concluded, as an agent of Two Men and Truck/International, Inc., about your clients' and their agents actions . . . My conclusions are based on my observations and can not be disputed by anyone. A jury can decide if my conclusions were reasonable, given the existing circumstances." See Mr. Raymond's letter dated January 20, 1997, which is attached hereto as Exhibit "I". Thus, Mr. Raymond's testimony is supposed to be about his opinions (i.e., conclusions drawn from observations on actions). If such conclusions or opinions relate to an issue which is properly before the jury, then Mr. Raymond may make any permissible argument during closing argument as to the conclusions which he thinks it is reasonable for the jury to draw from Defendants' actions. That can be done whether Mr. Raymond testifies or does not testify. Second, Plaintiff had decided it had sufficient evidence without Mr. Raymond being a witness by the date of the hearing on the cross motions for partial summary judgment on March 11, 1996, because Mr. Raymond has admitted to the Court at the pretrial conference on January 15, 1997, that he did not decide he needed to be a witness until after that hearing.

Since Defendants can not know whether the failure to identify Mr. Raymond was due to willfulness, bad faith, or fault on the part of Plaintiff rather than Plaintiff's counsel which is part of the first factor to be considered under Freeland, Defendants suggest that Plaintiff should inform the Court whether the failure to identify Mr. Raymond was due to Plaintiff's or Plaintiff's counsel willfulness, bad faith, or fault.

The second factor of whether Defendants are prejudiced by Plaintiff's failure to cooperate weighs heavily in favor of excluding Mr. Raymond as a witness. If Mr. Raymond is permitted to testify, then the spirit of Rule 3.7 of the Michigan Rules of Professional Conduct would be violated because Mr. Raymond will be testifying at trial and acting as an advocate at trial. That Rule is designed to minimize situations in which an attorney both testifies and acts as an advocate at trial. At least two reasons for that Rule are (1) the difficulty that a jury will have in distinguishing between testimony given on the stand by the lawyer and statements made while asking questions as an advocate and (2) the unfair prejudice which might result from the extra weight which the jury might attach to the testimony of a witness who is acting in the dual capacity of witness and advocate. In addition, if Mr. Raymond is permitted to testify, Defendants may well have to call Mr. Huprich as a rebuttal witness which would also violate the goal of Rule 3.7 of the Michigan Rules of Professional Conduct. The trial could then well disintegrate into adversarial attorneys saying what they claim the other attorney orally said without any written confirmation and the conclusions they drew from such oral statements, with all of those oral statements arising after the parties had become adversarial. The focus of this case should be on what the

parties to this litigation did or did not do (e.g., Did TMT/Flint stop operating a Ryder rental truck business?; Did TMT/Flint even have to stop operating a Ryder rental truck business?; Did Plaintiff's notice to cure comply with the requirements of the Franchise Agreement?). To have attorneys swearing to what conclusions they drew during the course of the dispute which has been on-going for nearly two and one-half years and during the course of this litigation which has been on-going for a little over two years and two months would quite likely confuse the jury. That which would be extremely prejudicial to Defendants.[3]

With respect to the third factor, the Court has never warned Plaintiff that failure to identify witnesses could lead to the sanction of exclusion of witnesses. Nonetheless, this factor does not tilt heavily in favor of Plaintiff because Defendants' counsel warned Plaintiff's counsel that he could not be both a witness and trial counsel in February and March of 1996.

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[3] Another fact to be considered under the second factor explained in Freeland is whether there has been any dilatory conduct on the part of Defendants. At this point in time, Plaintiff has not accused Defendants of any dilatory conduct. Certainly, Plaintiff has not moved to exclude any witness identified by Defendants on the ground that such witness was not disclosed. A review of Plaintiff's Interrogatories to Defendants and Defendants' Response to Plaintiff's Interrogatories when compared to Plaintiff's Response to Defendants' First Set of Interrogatories certainly shows that Defendants have provided far more disclosure than Plaintiff has provided. See Exhibits "J" and "K" in comparison to Exhibits "A" and "B".

As Defendants do not seek a sanction which results in a dismissal of the Plaintiffs' Complaint, the fourth factor is irrelevant to the sanction Defendants seek with respect to excluding Mr. Raymond as a witness.

. . .

4. Any evidence that a preliminary injunction was entered or sought in this case should be excluded on the grounds of (a) relevancy (F.R.E. 402) and (b) unfair prejudice outweighing probative value (F.R.E. 403).

. . .

8. Plaintiff should be prohibited from calling Don C. Huprich as a witness pursuant to Fed. R. Civ. P. 37(c)(1). Plaintiff never identified Don C. Huprich as a potential witness until January 9, 1997. See Exhibits "A", "B", and "G". The reasons are the same as for excluding Mr. Raymond.

EXHIBIT "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFF

Defendants propound, pursuant to Fed. R. Civ. P. 33, the following First Set of Interrogatories to Plaintiff. Plaintiff is required to answer each interrogatory separately and fully in writing under oath and to serve a copy of its answers upon Defendants' attorney within thirty (3) days from the date of service hereof as required by Fed. R. Civ. P. 33. You are reminded of your duty to supplement your answers to the full extent required by Fed. R. Civ. P. 26(e).

DEFINITIONS

A. When used herein, the terms "Plaintiff" and "you" and any synonym or plural thereof and derivatives therefrom are intended to and shall embrace and include Plaintiff Two Men and a Truck/International, Inc.

B. As used herein, the term "document" means every book, document, and other tangible thing as defined in Fed. R. Civ. P. 34 including, but not limited to, all written, printed, or typed records, reports, papers, contracts, writings, drawings, graphs, charts, letters, checks, statements of witnesses, statements of persons who were not witnesses but who have information relating to the subject matter of this lawsuit, notes, logs, memoranda, work sheets, insurance policies, photographs, phono-records, tape recordings,

computer disks, computer tapes, computer stored information, lists, correspondence, and other data compilations from which information can be obtained or translated (if necessary, by the respondent through detection devices into reasonably usable form), and further including, but not limited to, all copies of the foregoing items which vary in any fashion from the original, and all drafts prepared in conjunction with the foregoing items (whether used or not).

C. As used herein in conjunction with a reference to a person or entity, the term "identify" means to provide enough information to enable Defendants to serve a subpoena on such person or entity and to contact any such person by telephone or any such entity's employees by telephone.

D. As used herein in conjunction with a reference to a document, the term "identify" or "identity" means to provide enough information to enable Defendants to subpoena each person and entity (who has possession, custody, or control of the document) to produce the document.

INSTRUCTIONS

A. If the full answer to an interrogatory is not known, state that the full answer is not known and answer the interrogatory as fully as possible.

B. All information which is in the possession, custody, or control of Plaintiff or which can be ascertained through reasonable investigation by Plaintiff must be divulged. Please remember that the knowledge of Plaintiff's attorney and Plaintiff's accountant is deemed to be knowledge within the possession, custody, or control of the Plaintiff.

C. Any answer which is based upon information and belief should state that the answer is given upon information and belief.

D. If exact dates, amounts, or other facts or figures are not know, but Plaintiff has information permitting plaintiff to make an approximated or estimated answer and indicate that said answer is an approximation or estimation because more precise information is not known to Plaintiff.

E. If an interrogatory asks Plaintiff to identify a document, Plaintiff may answer the interrogatory by Plaintiff stating that the document will be produced and permitting Defendants to inspect and copy the document at the same time and place as specified in Defendants' most recent Request To Produce Documents.

F. If Plaintiff objects to these interrogatories on the basis that the number of interrogatories exceeds the number allowable under law, Plaintiff should answer the interrogatories, commencing with the first interrogatory stated herein and continuing in numerical order thereafter until Plaintiff has answered the number of interrogatories allowable under law, and, as part of your response to all subsequent interrogatories, include said objection.

G. If the answer to any interrogatory is withheld in whole or in part pursuant to a claim of privilege or on the basis of any other objection, Plaintiff shall state the following information: (1) the identity of each person and entity who or which has had possession, custody, or control of any information which is being withheld pursuant to a claim of privilege or on the basis of any other objection; (2) a

statement of the basis on which the privilege is claimed or the objection is made; (3) if the claim of privilege or the objection is based on a statute or rule, identify said statute or rule; (4) all facts upon which you rely as a basis for the claim of privilege or the objection; (5) identify all documents relating to any of the information which is withheld pursuant to a claim of privilege or on the basis of any other objection; and (6) describe the subject matter of any oral communication of any information which is being withheld pursuant to a claim of privilege or on the basis of any other objection.

INTERROGATORIES

1.

With respect to each allegation set forth in any Complaint filed in this action, please state, in detail, every fact which supports that allegation.

2.

With respect to each allegation set forth in the Counterclaim which Plaintiff denies, please state, in detail, every fact which supports that denial.

. . .

4.

With respect to each fact alleged in Plaintiff's Answer to the Counterclaim and each fact alleged in Plaintiff's Answers to these Interrogatories, please provide:

(a) the identity of each person who has knowledge of any such alleged fact and

(b) a summary of the knowledge possessed by each person identified in your answer to subparagraph (a) of this interrogatory with respect to each such alleged fact.

. . .

10.

Identify all witnesses whom Plaintiff will or may have present at trial including expert and impeachment witnesses.

11.

For each lay witness listed in your answer to interrogatory no. 11, provide a description of the issues to which the witness's testimony will relate.

. . .

14.

With respect to each oral communication that occurred between (A) any former or current shareholder, director, officer, partner, joint venturer, master, employee, servant, associate, principal, agent (including any attorney), private investigator, insurer, or representative of, in, for, or with any Defendant and (B) any former or current shareholder, director, officer, partner, joint venturer, master, employee, servant, associate, principal, agent (including any attorney), private investigator, insurer, or representative of, in, for, or

with Plaintiff, state the date of the communication; whether the communication was during a face-to-face conversation or over the telephone; the identity of each person who was present during any portion of the communication; the identity of each person who participated in the communication; and, with respect to each person who participated in the communication, the substance of the statements made by such person during the communication.

Respectfully Submitted,

HUPRICH & ASSOCIATES, P.C.

_____

DON C. HUPRICH
George Bar No. 379550
Huprich & Associates, P.C.
Lead Co-Counsel for Defendants
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Dated: October 16, 1995

EXHIBIT "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES

Plaintiff TWO MEN AND A TRUCK/ INTERNATIONAL, INC. ("TMT"), through its attorneys, May, Simpson & Strote, states for its response to Defendants' First Set of Interrogatories to TMT states as follows:

1. TMT objects to this interrogatory for the reason that it is overbroad and burdensome, and seeks information that is not relevant or is not in dispute. Without waiving TMT's objection TMT states that Defendants should see:

i. TMT's Second Amended Verified Complaint;

ii. TMT's Motion and Brief in Support of Preliminary Injunction and Reply Brief in connection with it;

In further response, and without waiving objections, TMT states generally that:

A. as to Count I-Unfair Competition, Defendants' continuing use of TMT's service mark after termination of Defendants' franchise constitutes a violation of the federal Lanham Act;

B. as to Count II-Unfair Competition, Defendants' continuing use of TMT's service mark after termination of Defendants' franchises constitutes violations of Michigan's unfair competition in trade laws;

C. as to Counts III-Breach of Franchise Agreement, Defendants' failure to file gross sales reports, pay royalties, advertising fees and other miscellaneous amounts, (including reasonable attorneys' fees incurred in connection with this litigation (Article IX(2) of the Franchise Agreement) and Defendants' failure to comply with post-termination obligations under the Franchise Agreement, and demands for rescission constitute violations of these Franchise Agreement;

D. as to Count IV-Defendant Fernsler's Breach of the Personal Guarantee, Defendant Fernsler's failure to file gross sales reports, pay royalties, advertising fees and other miscellaneous amounts, (including reasonable attorneys' fees incurred in connection with this litigation (Article IX(2) of the Franchise Agreement) and Defendants' failure to comply with post-termination obligations under the Franchise Agreement, and demands for rescission constitute violations of her personal guarantee;

E. as to Count V-Breach of Non-Competition Provision, Defendants' continued operation after termination of the Franchise agreement, constitutes a violation of Article VIII of the Franchise Agreement.

2. TMT objects to this interrogatory for the reason that it is overbroad and burdensome, and seeks

information that is not relevant or is not in dispute. Without waiving TMT's objection TMT states that Defendants should see:

i. TMT's Second Amended Verified Complaint;

ii. TMT's Answer to Counterclaims;

iii. TMT's Affirmative Defenses to Counterclaims;

iv. TMT's Motion and Brief in Support of Preliminary Injunction and Reply Brief in connection with it.

In further response, and without waiving objections, TMT states generally that:

A. as to Count One of the Counterclaim, alleging violations of Michigan's Franchise Investment Law, TMT did not violate this statute, because it took no actions, nor made any statements to defraud Defendants. The claim was brought more than four years after the alleged fraudulent action and is barred by the four-year statute of limitations.

B. as to Count Two, alleging breaches of the terms of the Franchise Agreement, TMT has performed in good faith and as required under the Franchise Agreement so as to provide support to the Two Men and a Truck franchisees and franchise system. It terminated Defendant Fernsler as a result of her failure to provide gross sales reports, pay royalties and advertising fees. Defendants acknowledged and confirmed the termination by not providing reports and

making the payments and by demanding rescission after the notices of termination were sent to Defendants.

C. as to Count Three for Declaratory Judgment regarding TMT's right to the Two Men and a Truck service mark, TMT did not abandon the mark, or undertake any action to cause it to forego its rights to its Two Men and a Truck service mark and logo.

3. TMT objects to this interrogatory for the reason that it is overbroad and burdensome, and seeks information that is not relevant or is not in dispute. Without waiving TMT's objection TMT states that Defendants should see:

i. TMT's Second Amended Verified Complaint;

ii. TMT's Answers to Counterclaims;

iii. TMT's Affirmative Defenses to Counterclaims;

iv. TMT's Motion and Brief in Support of Preliminary Injunction and Reply Brief in connection with it.

In further response, and without waiving objections, TMT states generally that:

A. Regarding Affirmative Defenses #1 and #2, the alleged fraud occurred more than four years before any cause of action was brought and is barred by the statute of limitations, MCL §445.1533.

B. Regarding Affirmative Defense #3, based upon the allegations in Defendants' pleadings, they signed the franchise agreement and related documents acknowledging, among other things, TMT's ownership of the service mark; this acknowledgment precludes Defendants from prevailing on Count Three of the Counterclaim.

C. Regarding Affirmative Defense #4, Defendants have waived any claim for breach of contract, because they continued to pay royalties and advertising fees during the course of the franchise agreement, without claiming or giving notices of the breaches claimed in the Counterclaim. Defendants cessation of providing gross sales reports and making payments when due and the demand for rescission of the franchise agreement constitutes a waiver of any rights to use the Two Men and a Truck mark that were provided to Defendants under the franchise agreement. Defendants waived any claim for rescission by voluntarily paying royalties and advertising fees for 4 years after the alleged fraud occurred.

D. Regarding Affirmative Defense #5, Defendants' material breaches included failure to provide gross sales reports, failure to pay royalties and advertising fees when due, failure to perform post-termination obligations under the franchise agreement and demanding rescission of the franchise agreement.

E. Regarding Affirmative Defense #8, TMT's efforts to protect its mark by registering it in numerous states, applying to obtain a federal registration, licensing franchisees to use the mark, bringing suit to protect its rights in the mark and taking other actions is proof that it has not abandoned the

mark.

F. Regarding Affirmative Defense #9, Defendants' failure to promptly bring claims for violations of franchise statutory laws until long after the time that the wrongful acts allegedly occurred, gives rise to the defense of laches.

G. Regarding Affirmative Defenses ##10, 11 and 12, TMT's financial success and Defendants' continued use of the mark after termination of the franchise are evidence that Defendants believe that the mark has significant worth, that it is not generic and that it is not merely descriptive, without a secondary meaning.

H. Regarding Affirmative Defense #13, the franchise agreement that Defendants acknowledge they signed is evidence that TMT did not issue a naked license. Plaintiff's on-going development and control of its franchise system is evidence that TMT is controlling the use of its mark.

4. TMT objects to this interrogatory for the reason that it is overbroad and burdensome, and seeks information that is not relevant or is not in dispute. Without waiving TMT's objection TMT states that Defendants should see:

i. TMT's Second Amended Verified Complaint;

ii. TMT's Answers to Counterclaims;

iii. TMT's Affirmative Defenses to Counterclaims;

iv. TMT's Motion and Brief in Support of Preliminary Injunction and Reply Brief in connection with it.

In further response, and without waiving objections, TMT states that the following witnesses will testify regarding Defendants' Counterclaim; more specifically:

i. Mary Ellen Sheets will testify regarding alleged breaches of the franchise agreement, and alleged breaches of franchise laws and efforts to protect the service mark and logo;

ii. Melanie Bergeron will testify regarding alleged breaches of the franchise agreement and efforts to protect the service mark and logo;

iii. Russ Scott will testify regarding alleged breaches of contract regarding training and on-going assistance to franchisees, including Defendants;

iv. Sally Degnan will testify regarding administration and on-going assistance and training, including Defendants;

v. Other TMT employees may testify regarding the support provided to franchisees, including Defendants.

vi. Raymond Damas will testify regarding allegations of violations of Michigan's franchise investment law and validity of the service mark.

5. TMT objects to this interrogatory for the reason that it seeks information that is not relevant or calculated to lead to the discovery of admissible evidence, since Defendants have acknowledged receipt of confidential information and promised to maintain its confidentiality [See Article I(2) of the franchise agreement and page 14 of the franchise agreement]. TMT also objects to this interrogatory because it seeks confidential information, which TMT does not intend to disclose to the public for access to its competitors. Without waiving TMT's objection, TMT states that TMT's operating system, and material relating to it generally describe its confidential information without disclosing the confidential information.

6. See answer to Interrogatory #5.

7. TMT objects to this interrogatory for the reason that it seeks information that is not relevant or calculated to lead to the discovery of admissible evidence, because whether or not there are or were other business entities using the words "Two Men and a Truck" is of no consequence to these Defendants, who are estopped from denying the validity of the service mark. (See page 9 of Judge Quist's July 24, 1995 Opinion issued in the companion case in the U.S. District Court for the Western District of Michigan entitled Two Men and a Truck/ International, Inc. v. Two Men and a Truck/Kalamazoo, Inc., et al, Case No. 94-CV-162) and Judge Taylor's oral opinion from the bench at pages 75 and 76 of the transcript in the companion case in the U.S. District Court for the Eastern District of Michigan entitled Two Men and a Truck/International, Inc. v. Pamela Fernsler, et al, Case No. 94-CV-72561-DT.

8. This interrogatory is not applicable; see response to Interrogatory #7.

9. TMT's damages:

i. Lanham Act 15 U.S.C. §1117 damages:

The Act requires Defendants to account to TMT for all gains and profits derived by them resulting from their unfair competition, i.e. using TMT's mark in violation of the Act, which amounts are damages suffered by TMT. The damages may be trebled by the court. TMT is also entitled to recover its reasonable attorneys fees, expenses and costs under the Act. These Defendants have not yet disclosed their gross sales for the period after the date of termination, October 5, 1994. Therefore, Lanham Act damages cannot be calculated. However, through October 31, 1995, TMT incurred $24,772.50 in attorneys' fees and $3,115.77 in expenses in connection with this litigation, for a total of $27,888.27.

ii. Breach of Franchise Agreement damages: Based upon the franchise agreement Defendants owe:

- 4% royalty, from September, 1994 through October 6, 1994;

- 1% advertising fee from September, 1994 through October 6, 1994;

- plus interest as authorized by Article IV(5);

- attorneys fees as authorized by the franchise agreement, Article IX(2);

- miscellaneous costs.

iii. Breach of Non-competition Agreement: Based upon an inability to sell a Two Men and a Truck franchise in the territory during the pending litigation, TMT has suffered any and all damages resulting therefrom, including, but not limited to lost royalties, and loss of identity in the territory, and costs that will be incurred to assist a new franchisee to open in the territory. The damages for breach of this covenant have not yet been determined.

10-12. Without waiving its right to add witnesses, Plaintiff will or may have the following witnesses at trial, who will testify regarding issues described in these answers.

Name	Address-Phone	Subject of Information
Mary Ellen Sheets	Two Men and a Truck c/o Steven Raymond 100 W. Long Lake Bloomfield Hills, MI 48304 819-646-9500	Management of TMT Agreements with Defendants Defendant's success at TMT Use of mark and other matters relating to mark

		Statements to Defendants Quality Control Establishment of Franchise
Melanie Bergeron	same as above	same as above, except for establishment of franchise Ryder rental addendum to FA Termination Use of mark after termination Continuance of on-going business
Sally Degnan	same as above	Administration of TMT Training Quality Control
Ann Nebe	same as above	Use of mark after termination
Russ Scott	same as above	Training Quality Control
Ray Damas -	6810 Cedar, Ste 2b Lansing, MI 48911 517-694-0910	Same as Sheets Statements to Defendants
Dale Mattis	200 Ottawa Ave Suite 700 Grand Rapids, MI	Creation of PEF, Inc. Matters pertaining to termination
Defendants		All factual issues pertain to the claims and counter-claims

TMT may use its accountant to ascertain damages suffered as a result of Defendants' violation of the federal Lanham Act and on-going violations of the non-competition

agreement, as well as any other damages it has suffered. TMT may also use its accountant to testify pertaining to any alleged damages asserted by Defendants in their counterclaims. By this response, TMT does not waive its right to add witnesses as it becomes aware of them, and/or expand the testimony upon which any witness may testify.

13. Art Vine, CPA, 1989-1991; Stuart & Hines, CPA, 1992-1994; George G. Madan Company, bookkeepers, 1989-1992.

14. TMT objects to this interrogatory for the reason that it is vague, overbroad and burdensome, and seeks information that is not relevant or calculated to lead to the discovery of admissible evidence.

15. TMT objects to this interrogatory for the reason that it is vague, overbroad and burdensome, and seeks information that is not relevant or calculated to lead to the discovery of admissible evidence.

16. TMT objects to this interrogatory for the reason that it is overbroad and harassing and seeks information that is not relevant or calculated to lead to the discovery of admissible evidence.

17. Mary Ellen Sheets (shareholder, director, officer), Melanie Bergeron (director and officer), Jon C. Sorber (director), James B. Sorber (director).

18. TMT objects to this interrogatory for the reason that it is overbroad and burdensome, and seeks information that is not relevant or calculated to lead to the

discovery of admissible evidence. Without waiving its objection, TMT states that TMT's legal counsel prepared these answers to interrogatories, with the assistance of Melanie Bergeron.

The answers provided in these interrogatories are true to the best of my knowledge information and belief.

/s/_____
MELANIE BERGERON
President, Two Men and a Truck/
International, Inc.

EXHIBIT "I"

January 20, 1997

MAY, SIMPSON & STROTE
ATTORNEYS AND COUNSELORS
100 WEST LONG LAKE ROAD, SUITE 200
BLOOMFIELD HILLS, MI 48204-2774

VIA FACSIMILE ONLY
Fax # (770) 934-4142

Don C. Huprich
Huprich and Associates
1726 Montreal Circle, Suite B
Tucker, Georgia 30084

Re: TMT v. Pam Fernsler, et al, U.S. District Court, Eastern Dist. Michigan, Case No. 94-CV-75261

Dear Don:

In response to your facsimile dated January 20, 1997, please be aware that the testimony I intend to provide that cannot be disputed is what I concluded, as an agent of Two Men and a Truck/International, Inc., about your clients' and their agents' actions, including:

(1) the continuing sale of Ryder Rental Truck services after the notice of termination was sent to your client,

(2) your clients' failure to provide monthly reports and pay royalties and advertising fees beginning in September 1994 within days after the notice of termination became effective,

(3) numerous other actions of your clients that made it obvious that there was no intention of complying with the terms of the franchise agreement.

My conclusions are based on my observations and cannot be disputed by anyone. A jury can decide if my conclusions were reasonable, given the existing circumstances.

I will also be testifying regarding the attorney's fees my client has incurred to protect their service mark and for which it is entitled to be reimbursed pursuant to 15 U.S.C. §1117.

By this letter, I am not limiting or waiving my right to testify about other matters that it may become necessary for me to testify about. However, at the present time, the above describes what I believe it will be necessary for me to cover.

Regarding your inquiry pertaining to letters sent to me on February 7, 1996 and March 8, 1996, I did receive them. I did not respond to them in writing. Although, I cannot recall the dates at the present time, you and I did discuss on more than one occasion whether I could testify as a witness and also act as attorney for my client. I have consistently stated that I believe I could appropriately do so in this case.

Frankly, Don I'm confused about the position you have taken with respect to this matter. You told all of us during the Final Pretrial Conference with Judge Taylor that if I was a witness in the case, you would be required to withdraw, because then you would be required to become a witness in this action. Yet, you have already filed two affidavits in this case, the second of which clearly sets forth a contested issue, namely, whether you implied or indirectly suggested that your client had no intention of abiding by the terms of the TMT franchise agreement when you told me that your client would be filing a Demand for Arbitration to rescind the franchise agreement. My client intends to testify that it was its understanding that your clients had no intention of abiding by the terms of the franchise agreement based on your actions with me. So even if I do not testify, it would appear that you will be testifying to a contested fact, specifically what you said to me to induce to believe that your clients had no intention of abiding by the franchise agreement.

Regarding my position about acting as a witness and an attorney, you have known my position for some time (at least since I filed my affidavit referenced in your February 7, 1996 letter to me). Thus, you've had nearly one year to bring a motion regarding this issue, but have not. It is rather late to now bring a motion to disqualify me as an attorney in this case.

On the other hand, based on your statements to the attorneys and the court at the final pretrial conference, it would appear you have an obligation to withdraw.

Please let me know what you decide.

Very truly yours,

/s/_____
Steven M. Raymond

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EXCERPTS OF TRIAL TRANSCRIPT

(February 21, 1997)

* * *

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DIRECT EXAMINATION

BY MR. ALEXSY:

Q. Morning, Mr. Raymond.

A. Morning.

Q. Could you state your name for the record.

A. My name is Steven Raymond. Excuse me. I'm an attorney.

Q. All right. Anticipated my next question. What do you for a living? You say you're an attorney. How long have you been practicing law?

A. Since 1980, December.

Q. Do you have any particular areas of specialty that you practice?

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A. I work in the area of franchise litigation and transactional work. I also do employer-employee relations, litigation and transactional work, generally from the defense side.

Q. How long have you been involved then area of franchising?

A. I would say, approximately, 10 years.

Q. And what firm do you practice with now?

A. The name of the firm is May, Simpson & Strote.

Q. Where are they located?

A. In Bloomfield Hills, Michigan.

Q. You're the attorney for Two Men and a Truck, International; is that correct?

A. I am.

Q. How long have you represented them?

A. Since, approximately, March of 1994 March or April.

Q. During your time representing Two Men and a Truck, International, who have been the people who you primarily deal?

A. Melanie Bergeron, Mary Ellen Sheets, and other members of the staff there.

Q. During your representation of Two Men and a Truck, International, I assume you've become familiar with the events which surround the termination of franchisee in Flint known as Two Men and a Truck/Flint?

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A. I am familiar with those.

Q. All right. Let me show you an exhibit we've marked yesterday. That's Plaintiff's Exhibit 9. Take a moment to look at it and then identify it, please.

A. This is a letter that I prepared and sent to Ms. Fernsler. It's dated September 23, 1994. I sent it on that date. It relates to the fact that she was continuing to sell Ryder Rental services from her Two Men and a Truck business without authority.

Q. Who directed her to send this letter?

A. My client, Two Men and a Truck, International.

Q. Anyone in particular Two Men and a Truck?

A. Ms. Bergeron.

Q. Would you please read the letter out loud.

A. Dear Miss Fernsler: This law firm represents Two Men and a Truck, International, Inc. formerly known as Two Men and a Truck/USA, Inc. in connection with various legal matters.

Our client has informed us of your Two Men and a Truck franchise's relationship with Ryder Truck, including the fact that your Two Men and a Truck franchise has entered into a dealer agreement with Ryder without authority of Two Men and a Truck,

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International, Inc. and in violation of your Two Men and a Truck franchise agreement.

Specifically, your franchise is violating Article II, Section 3; Approved services. Article III Section 4, manner of using marks.

And Article III, Section 7. Permitted business name, in addition to other possible violations of the franchise agreement.

It is my understanding that Two Men and a Truck, International Inc.'s President, Ms. Melanie Bergeron, has attempted to amicably resolve the matter by providing a form of amendment to your

franchise agreement that would authorize the sale of Ryder Truck services from your Two Men and a Truck location on a trial basis.

It is also my understanding that you verbally agreed to sign the agreement sent to you about two months ago, but have since informed her you will not sign it.

Please understand that Two Men and a Truck, International Inc. desires to continue its business relationship with your Flint franchise.

However, the relationship cannot continue if you do not cease violating the Two Men and a Truck franchise agreement.

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You must sign the amendment promptly and return it to Ms. Bergeron. Otherwise, you will continue to be in violation of the franchise agreement.

If this matter cannot be amicably resolved within 7 days, then it will be necessary for Two Men and a Truck, International, Inc. to take necessary legal action to terminate your franchise.

Very truly yours.

Q. Now you talk about an amendment that was prepared. Did you prepare that amendment?

A. I did.

Q. Do you recall when you — who you sent the amendment to after you completed drafting it?

A. I sent it to Ms. Bergeron.

Q. Do you recall what date you sent that amendment to Ms. Fernsler?

A. It would have been sometime in early August.

Q. Now this letter's dated September 23rd. Did you send it on September 23?

A. Yes.

Q. Did you hear on or about September 23 from Ms. Bergeron or anyone representing Ms. Bergeron?

A. From Ms. Bergeron?

Q. I'm sorry. From Ms. Fernsler or anyone representing Ms.

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Fernsler?

A. Yes, I did. I heard from a person named Don Huprich who represented himself as an attorney claiming that he was representing Two Men and a Truck/Flint, Inc.

Q. And when did you hear from Mr. Huprich?

A. On September 23, the day I sent this letter.

Q. So you don't believe Mr. Huprich had an opportunity to see the letter?

A. I'm certain he had not.

Q. Tell me the substance of the phone call.

A. Well, the substance of the phone call was — first of all, I'd never heard of Mr. Huprich, didn't know who he was and — but the substance of the phone call was he was from Atlanta, Georgia, had some relationship up here in Michigan. He went to Michigan Law School and knew some folks up here, attorneys and such.

And that his — he was representing Two Men and a Truck/Flint, Inc. and that Two Men and a Truck/Flint Inc. was claiming there were technical violations that had occurred at the time Ms. Fernsler had purchased her franchise agreement some four years before.

Q. Technical violations with regard to what?

A. With regard to disclosures that were made to her,

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it's Mr. Huprich's name.

Q. All right. Who's Mr. Huprich's client?

A. Two Men and a Truck of Flint, Inc.

Q. And there's a — there's a part of a form --

A. Excuse me, Mr. ALEXSY. As I look at this signature, this looks like it may be the signature of Mr. Andrews, who I believe is Mr. Huprich's associate. It's hard to read the signature, though.

Q. On the form, there's a line that says "claim or relief sought". And there's a typewritten form after that, that pre-printed portion. What is "claim or relief sought"?

A. After — you want me to read that?

It says: Claimants seeks a determination as to whether it is entitled to rescind the franchise agreement or to permanently cease any further performance under the franchise agreement.

Claimant also seeks a determination as to whether it is entitled to continue to use its corporate name and/or the words "Two Men and a Truck".

Q. All right. What does the word "rescind" mean to you?

A. Well, in layman's terms, it means they want to cancel,

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they want to get out, they want to go away, they want to walk away from the system. They want to say the contract is not valid.

Q. This is dated September 26th. If you recall, was the Notice of Termination sent by Two Men and a Truck, International, also dated September 26th?

A. I believe so, yes.

Q. So what was your conclusion as to what Two Men and a Truck/Flint's intentions were after you read this demand for arbitration?

A. Well, after reading the demand for arbitration, and after the phone call from Mr. Huprich the prior Friday, it was pretty clear to me they had no intention of signing any addendum, that they were going to get out of the system one way or the other.

Q. Now have you — had you had subsequent phone calls or letters from Mr. Huprich regarding Two Men and a Truck/Flint's attempts to rescind or get out of the system?

A. Several.

Q. Several? Several phone calls and several letters?

A. Yes. Well, I've had, yes, at least three letters following this demand for arbitration where Mr. Huprich either stated he intended to have Mr. Huprich get out or he

actually made demands for rescission that would, in affect, parallel this demand he made with the arbitrator.

Q. There was an unequivocal demand for rescission in the letter?

A. Twice in two separate letters, November 1, 1994 and November 2, 1994, in addition to this demand that he filed with the American Arbitration Association.

Q. Let me show you the exhibit we had admitted yesterday, it's Plaintiff's Exhibit 13. Take a look at it, tell me what it is.

A. This appears to be — this is a copy of the letter that I received from a fellow — any attorney by the name of Dale Mattis. It's dated October 5, 1994.

Q. Who is Dale Mattis?

A. Well, up until the moment I received this letter, I'd never heard of Mr. Mattis.

Q. Who does he appear to be from his letter?

A. Mr. Mattis indicates in this letter that he's representing as an attorney Two Men and a Truck/Flint, Inc.

Q. Will you please read the letter out loud.

A. Yes. But before I do may I have a drink of water?

THE COURT: Maybe you can ask your colleague so we won't have to leave to get his drink of water.

THE WITNESS: Dear Mr. Raymond:

We are attorneys for Two Men and a Truck Inc.

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franchisees under the September 27, 1990 franchise agreement.

In response to your September 26, 1994 correspondence, please be advised that my client has written to Ryder Truck Rental and advised them that it will no longer operate a Ryder Rental Truck business.

This step was taken to amicably resolve your concern and is not intended, nor should it be interpreted as an admission by Two Men and a Truck Flint/Inc. it was in violation of the franchise agreement.

Having taken this action in advance of the date of termination that you imposed, it is our position that the termination will not take place — take affect on October 6, 1994.

Please feel free to call the undersigned if you have any additional questions.

Very truly yours, Dale A. Mattis.

Q. Is there a cc or carbon copy on that letter?

A. Yes, to Ms. Pamela Fernsler.

Q. Is Mr. Huprich copied on that letter?

A. He is not.

Q. Wait for you to get some water.

THE COURT: You can bring the water up. I'll explain to the jury, the courthouse does

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BY MR. ALEXSY:

Q. Back to the letter of October 5 from Dale Mattis to Mr. Huprich. So prior to this letter, you had never heard from Mr. Mattis?

A. No, I had not.

Q. He writes that: In response to your September 26, 1994 correspondence. Well, in fact, you didn't write any?

A. No. I think he's referring to Ms. Bergeron's letter.

Q. He says:

Please be advised my copy it has written to Ryder

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Truck Rental and advised them that it will no longer operate a Ryder Truck Rental business.

Was that sufficient, in your opinion, to cure the various defaults that you had referenced in your letter to — Ms. Bergeron referenced in her letter?

MR. HUPRICH: Your Honor, we've heard Mr. Raymond giving his opinion to the jury as to what his conclusions were. I've let it go this far, but now we're reaching where he's invading what the jury's supposed to decide, so I object on that ground.

THE COURT: What exactly was that?

MR. ALEXSY: The question was, was it sufficient, in your opinion, to cure the defaults as set out in the previous letters with regard to the franchise agreement?

THE COURT: Sustained. He's a fact witness, not an expert in the law for the jury.

MR. ALEXSY: All right.

BY MR. ALEXSY:

Q. As result of this letter, did you respond?

A. I sent a letter, yes, back to Mr. Mattis. And I, also, copied the letter, I believe to Mr. Huprich.

Q. Let me show you Plaintiff's Exhibit 14, which I believe was entered yesterday.

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A. Yes. This is the letter I sent October 6, 1994. The following, excuse me. I sent this on October 6, 1994 to Mr. Mattis. I'm looking at his letter to see if I received his letter by facsimile on the Fifth. Yes, I did. It says via facsimile.

So, yes, on the 6th, my client checked to see if, in fact, Ryder services were still being sold from the location because, frankly, we were — I was confused and my client was confused, because Mr. Huprich had told us by telephone by the demand for arbitration that he filed on September 26th, and by a letter that I received on October 3rd, in which he, once again, reasserted that his client was getting out of the system.

I was confused because I had all those facts, now I get this letter from Mr. Mattis who says he's representing the same client and says they've cured the defect.

Q. Would you read your letter of October 6th, please.

A. Just — I was confused and so the client checked to see what was going on.

Dear Mr. Mattis: I am in receipt of your letter dated October 5, 1994 regarding Two Men and a Truck/ Flint, Inc.'s action to cure its violation of the above referenced franchise agreement, by writing

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to Ryder — by writing to Ryder Rental Truck to inform it that your client will no longer operate a Ryder Truck business.

By independent investigation, my client, Two Men and a Truck, International, Inc. has learned that your client continues to answer the phone as Ryder Truck Rental or Ryder Rental and is representing and continues to display a big Ryder sign in the front business.

Your client has failed to cure as required under the terms of the franchise agreement.

Very truly yours,

I sent this letter, via facsimile, to Mr. Mattis on October 6th, and, also, to Mr. Huprich. It's copied. And I'm not sure I've sent it by facsimile to Mr. Huprich or not.

Q. Now did you hear from Mr. Mattis in response to that letter?

A. Never heard from Mr. Mattis.

Q. Have you ever talked to Mr. Mattis about this matter at any time?

A. I have never talked to Mr. Mattis about this matter.

Q. Did you talk to Mr. Huprich about the Ryder Truck Dealership agreement after the October 6, 1994 letter?

A. On October 6, 1994, I did call Mr. Huprich and inform

[p. 366]

him of this situation with Ryder Rental Truck.

And, generally — when I got Mr. Mattis' letter, I assumed Mr. Huprich and Mr. Mattis had been talking and that there was some — I mean, they knew of each other and that — so being confused and Mr. Huprich being the attorney that I had dealt with, I called him that day to let him know that we had then checked this out. She was still selling Ryder services.

Q. Did Mr. Huprich offer an explanation as to why that was?

A. No, he didn't. But he did say he would talk to Ms. Fernsler about it.

Q. Did he ever follow up with you in that regard?

A. He did not follow up in terms of the Ryder Truck Rental matter. The only conversations I had with Ms. Fernsler Mr. Huprich related to Ms. Fernsler getting out of the system. He never expressed any interest in having her stay in the system and continue with Ryder Rental Truck services.

Q. Do you ever come to an understanding as to why, on October 5th, Two Men and a Truck/Flint is claiming to have cured a default, yet at the same time, Mr. Huprich is trying to get his client out of the system?

[p. 367]

A. No. Because they're 180 degree different directions. One you stay in, one you get out. To this day, I don't understand why that went on.

MR. ALEXSY: Thank you.

MR. HUPRICH: Your Honor, in light of the fact that Mr. Raymond has just recently become permitted to testify in the case, can I have about 10, 15 minutes to prepare for cross examination of him?

THE COURT: All right. 10 minutes. This is a little too early for our morning recess. We'll take 10 minutes.

CROSS EXAMINATION

BY MR. HUPRICH:

Q. Morning, Mr. Raymond.

A. Morning, Mr. Huprich.

Q. During your testimony there a moment ago, you told the jury your memory of certain things I supposedly said, right?

A. Yes, sir.

Q. And then you told the jury about certain opinions or conclusions you drew from those facts, right?

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MR. ALEXSY: I'm going to object to the form of these questions. It seems to be a memory test as to what he said 20 or 30 minutes earlier and to decide whether the testimony now will match up with what the testimony was 20 or 30 minutes earlier.

THE COURT: Let's cross examine on the testimony. Let's not ask for him to state again everything he said, please.

MR. HUPRICH: I'm not trying to.

THE COURT: All right.

BY MR. HUPRICH:

Q. Now these were statements you were hearing from me, right?

A. I characterized earlier statements that I understood you said to me, that's correct.

Q. Okay. Now you never identified me as a person having knowledge of any facts in response to any interrogatory response, did you?

A. you show me the answers, Mr. Huprich. I'll be glad to review them. I don't recall at this point in time what I did in that regard.

Q. For the record, I'm handing the witness a copy of plaintiff's response to defendant's interrogatories which — the original which has been filed with the court previously.

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A. I don't see your name anywhere in the responses to the answers to interrogatories, Mr. Huprich.

Q. Thank you. Was it during January of this year that you indicated to the court that you thought I might be a witness?

MR. ALEXSY: I'm going to object to the relevance of this line of questioning.

THE COURT: Overruled.

THE WITNESS: I don't know that I — I don't recall ever having indicated in court you're going to be a witness at all.

I indicated to you over the last year and-a-half that I thought I may end up having to be a witness in this case.

BY MR. HUPRICH:

Q. Okay. Well, let's — that's what you claim you told me. You never listed yourself as a witness in the interrogatory responses, did you?

MR. ALEXSY: Objection. It's beyond the scope of the direct examination.

THE COURT: I think it goes to credibility. And he did tell Mr. Huprich he could cross examine in this

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area in exchange for the other.

THE WITNESS: I'm sorry, Mr. Huprich. Could you repeat the question?

BY MR. HUPRICH:

Q. You didn't list yourself as a person having a knowledge or as a witness until January 1997, did you?

A. In formal papers with the court, I did not list myself as a witness until January of '97. We had discussed the fact that I might be a witness in this case for, perhaps, two years. And with the filing of the motion for

preliminary injunction, which was heard two years ago, I signed an affidavit at that time.

Q. I'm aware of that affidavit. Okay. You had planned to try this case with Mr. ALEXSY until this past Tuesday morning, right, the day we selected the jury?

A. Yes. I was counsel in the case until Tuesday morning. That's correct.

Q. And on Tuesday, the day that the jury was selected in the case, you were disqualified from being both the trial attorney and the witness?

A. The court disqualified me because the court believed it was not appropriate for me to both a trial counsel and a witness in this case.

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Q. Okay. And you had not voluntarily withdrawn yourself?

A. I had not, because I believed it was appropriate for me, under the rules, to continue in both as both counsel and witness. The court did not agree with that, so I — I was disqualified.

However, I will say this, Mr. Huprich. In papers that I filed with the court with respect to that motion, I indicated to the court that I would be willing to withdraw as counsel if the court believed it was appropriate for me to do so.

Q. Okay. Now when I learned — I'm sorry. You wouldn't know when I learned something. During January, did you write a letter back to me, in essence, indicating that you were not willing to give me the substance of your testimony?

MR. ALEXSY: Objection, again, to the form of the question, to the relevance. It's beyond the scope of direct examination.

THE WITNESS: I don't recall that, Mr. Huprich.

THE COURT: Overruled.

THE WITNESS: If you have a letter to show me, you may show me. I don't recall that.

BY MR. HUPRICH:

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Q. I think the letter maybe talks about a few things. But let me hand you a letter.

MR. ALEXSY: May I see the letter first?

MR. HUPRICH: I'm sorry. The letter does not go quite as far as I thought it did in saying you refused to say nothing.

MR. ALEXSY: Read the whole letter in.

MR. HUPRICH: Ha?

MR. ALEXSY: Read the entire letter.

THE WITNESS: Am I to read this letter?

BY MR. HUPRICH:

Q. I wanted you to read it to yourself, it's not an exhibit, and see if that refreshes your recollection.

A. All right. I've reviewed the letter.

Q. Okay. Mr. Raymond, did you ever tell me you were going to get up here and tell the jury at that time the violations of the Michigan Franchise Investment Law claim by Two Men and a Truck/Flint were just technical violations?

A. Did I ever tell you I was going to tell the jury that?

Q. Yep.

A. No.

Q. Okay. Did you tell me that, to you, rescind means to

[p. 373]

cancel the contract? That you were going to tell the jury that?

A. No.

Q. Did you tell me you were going to tell the jury it was

pretty clear to you that there was no intent to comply?

A. Well, I have to look at the letter again. I can tell you there's words I think in my letter that characterize my testimony that I — I itemize several things I believe I'm going to testify to.

One of them are numerous other actions of your clients that made it obvious that there was no intention of complying with the terms of the franchise agreement. I think that addresses the question you just asked me.

Q. Did you tell me you were going to tell the jury that you recall a conversation with me where we talked about operating as a Ryder Dealer on October 6th?

A. Mr. Huprich, I think we can say this whole line of questioning. I don't think I told you anything specifically about with I was going to tell the jury. I characterized what my testimony would be here.

Q. That's exactly my point. Thank you. Now you indicated to the jury that you've been a trial attorney for over 10 years, 16 years, something like that?

[p. 374]

How long have you been a trial attorney?

A. I've done trial work for, probably 10 to 12 years.

Q. Okay. And you know what a declaratory judgment is,

right?

A. Yes, sir.

Q. And would you explain to the jury what a declaratory judgment is.

A. Well --

MR. ALEXSY: Well, let me make the same objection. Relevance. Beyond the scope of the direct examination.

MR. HUPRICH: It's directly on point, Your Honor.

Mr. Raymond has testified that they're only two choices that are directly contradictory. He said either you stay in or you stay out.

And I'm going to demonstrate through Mr. Raymond there's a third choice, which is you stay in while you find out your rights as to whether you can get out, that's what the demand for arbitration did. That's what that was seeking.

THE COURT: I thought you just asked him about declaratory judgments?

MR. HUPRICH: Then because, then he can explain that real easy.

[p. 375]

THE COURT: Oh, no. I'm sorry. His opinion on the law is not appropriate here. The Court will tel the jury what the law is applicable to this case. That isn't even necessary to this.

BY MR. HUPRICH:

Q. Let me ask the question to you in this way, Mr. Raymond. Didn't the demand for arbitration seek merely a determination of certain things?

A. It sought an arbitrator to determine what your client's rights were.

Q. That's the language you used?

A. That's correct. Uh-huh.

Q. And that language — that language doesn't say that they're getting out, does it, right then?

A. It doesn't say they're getting out right then, no. It does — you did — it does indicate, however, when two weeks later, 15 days later, your clients stops paying royalties and advertising fees, that they do expect they are getting out --

MR. HUPRICH: Move to strike the last as being nonresponsive to my question.

THE WITNESS: — particularly since they

paid them for four years.

MR. HUPRICH: Move to strike that, also, as being nonresponsive.

THE COURT: No. But move on, please. Only answer the questions as they are presented.

BY MR. HUPRICH:

Q. And those actions were taken after your client terminated, right, or claimed to terminate?

A. Which actions?

Q. The nonpayment.

A. The nonpayment occurred after your client was terminated, that's correct.

Q. After your client claimed to terminate them, right?

A. After the termination occurred on October 6th, 1994.

Q. Okay. Now you told the jury that all that Two Men and A Truck/Flint was doing was claiming technical violations regarding the timing of the delivery of the franchise offering circular.

I'd like to hand you defendant's interrogatory responses and ask you to look at this and see if it refreshes your memory.

A. All right. I've read that, Mr. Huprich.

Q. With that, let me have — does that help refresh your

[p. 377]

memory as to the allegations being made?

A. Yes.

Q. Okay. And weren't there allegations that there have been factual misrepresentations made on various things such as how much it cost to get the franchise going?

A. That's true. There were those allegations made.

Q. Okay.

A. Seemed odd you waited for years to make complaints about them.

MR. HUPRICH: Mr. Raymond — I'll move to strike as being nonresponsive.

THE COURT: Please, Mr. Raymond. If you're to be a witness in this case, avoid argument as an attorney. Answer the questions when they're posed.

BY MR. HUPRICH:

Q. This is the exhibit that we addressed a moment ago, which is Defendant's Exhibit 119.

A. Yes, sir. I've read this.

Q. Do you recognize that document?

A. This is a letter I wrote to you on October 7, 1994.

MR. HUPRICH: We move to admit Defendant's Exhibit 119.

MR. ALEXSY: No objection.

THE COURT: Received.

BY MR. HUPRICH:

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Q. Mr. Raymond, would you please read that letter — first tell the jury what the date of this letter is.

A. I've already done that. October 7, 1994.

Q. Okay. And would you read the letter to the ladies and gentlemen of the jury.

A. Yes. This is regarding various Two Men and a Truck franchise disputes.

Dear Mr. Huprich: This will confirm our telephone conversation of this date wherein it was agreed between my client, Two Men and a Truck, International, and your clients identified in your October 3, 1994 letter excluding Ms. Pam Fernsler, that you and I will attempt to negotiate settlement, at least until October 21, 1994, as between my client and your client, Mr. Fernsler.

We shall proceed with arbitration. The appropriate method and procedure for selecting arbitrators is set forth in the arbitration clause which requires each of us to select our own arbitrator, not necessarily from the pool of arbitrators selected by the American Arbitration Association. And those arbitrators will then select a third neutral.

If you have any questions, please give me a call. Although I will be out of the office this afternoon, I

[p. 379]

will check for messages.

Very truly yours, Steven M. Raymond

Q. Okay. Mr. Raymond, I'd like you to turn to Defendant's Exhibit #107.

A. Yes.

Q. Do you recognize that letter?

A. I recall this letter. This is a letter you sent to me.

MR. HUPRICH: Move to admit Defendant's Exhibit #107.

MR. ALEXSY: Did we get the date on the letter?

THE WITNESS: It's November 4, 1994.

MR. ALEXSY: No objection.

THE COURT: Received.

BY MR. HUPRICH:

Q. Would you read the body of that letter to the jury, please.

A. Dear Steve: This letter is to confirm our prior telephone discussions relating to several misunderstandings you have expressed to your client and included in your letters in the counter claim. The first subject is your misunderstanding of our telephone conversation on September 23, 1994 which you initially claimed included a statement that I told you

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that Ms. Fernsler did not have any intention of complying with the applicable franchise agreement with respect to the Ryder Truck issue.

As you and I subsequently discussed, I did not

make any statement regarding Ms. Fernsler's intentions except that she would file a demand for arbitration as your client would not agree to a tolling agreement.

I advised you that such statement would make no sense, since I was not then involved with the Ryder Truck issue. And you admitted that you may have been mistaken as to your understanding and simply assumed that that was what I was meaning.

With respect to your letter dated October 7, 1994 relating to our telephone conversation earlier on that day, I did not tell you that arbitration.

Q. Excuse me. Did you just — you just read — I think misspoke. You just said I did not. I think it said I did.

A. I'm sorry.

Q. Why don't you start over on that paragraph so the jury is getting it correct.

A. With respect to your letter dated October 7, 1994 relating to our telephone conversation earlier on that date, I did tell you that the arbitration file on behalf of Ms. Fernsler could not be delayed for the duration of the negotiations, but I never told you

—

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that Ms. Fernsler was excluded from the group of

clients with respect to which you and I would attempt to negotiate a settlement.

The fact that Ms. Fernsler was willing to negotiate was specifically noted in my letter dated October 3, 1994 which was after the demand for arbitration was filed.

In light of your misunderstanding, I think it would be best if we tried to keep all further communications in writing.

Very truly yours, Don Huprich.

Q Now that letter references back to a letter dated October 7th. Is that the last letter that you just had talked to the jury about?

A. I believe it is, I think. I mean, I don't know what you're referencing. I don't know what's in your mind, but I suspect that's right.

Q. Do you believe it was?

A. Yes.

Q. Okay.

A. I just said that.

Q. I'm going to hand you Plaintiff's Exhibit 10. Are you familiar with that exhibit?

A. Yes. This is the letter of September 26, 1994 that

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was sent by Ms. Bergeron to Ms. Fernsler giving her notice of intent to terminate the franchise agreement if she didn't comply with it by taking care of the Ryder Rental services issue.

Q. Okay. Did you participate in the drafting of that notice?

A. I believe I did, yes.

Q. Okay. Had you ever assisted Ms. Bergeron with drafting notices of termination before that?

A. I may have.

I just become involved with the corporation. There may have been a termination of a Dallas franchisee in early 1994. I may have been involved in that.

I don't have a specific recollection, but I think that may have occurred.

Q. Prior to this time, had you helped Ms. Bergeron draft a Notice of Termination to Dwayne Sell for his trucks not being the right color?

A. I don't recall.

Q. Did you draft notices of termination to Mark May for not paying fees prior to this letter being drafted?

A. I don't specifically recall. I was — Mark May was certainly a former franchisee that I'm fully aware of.

Q. I didn't ask you --

A. I'm virtually certain I was involved in the drafting

[p. 383]

of that letter.

MR. HUPRICH: Now when you were giving never mind — that's all.

REDIRECT EXAMINATION

BY MR. ALEXSY:

Q. Mr. Raymond, when was the first time you became aware that Two Men and a Truck/Flint was claiming that it had not been terminated because of the Notice of Termination was defective?

MR. HUPRICH: Objection, Your Honor. Outside the scope of direct and cross.

THE COURT: It is.

MR. ALEXSY: We've just gone through the types of

understandings Ms. Fernsler had with regard to various issues in this case throughout the lawsuit.

We've gone through the answers to interrogatories.

We've talked repeatedly throughout this case when he became aware that just became an issue.

And part of what we're trying to present to the court is that was not told to us at the time all this occurred.

MR. HUPRICH: Your Honor, may we address the court on this, if you're considering this?

THE COURT: We're really down to what all

[p. 384]

the lawyers did and said, you realize that.

MR. ALEXSY: May I --

THE COURT: He may proceed. Go ahead.

THE WITNESS: I'm sorry, Mr. ALEXSY. you'll have to ask the question again.

BY MR. ALEXSY:

Q. When was the first time you became aware that Two Men and a Truck/Flint was claiming that it had not been properly terminated; that is, that the Notice of Termination was defective?

A. To the best of my recollection is when they answered the complaint that was — well, they answered the complaint in January of '95. I believe that's the first I learned, to the best of my recollection.

Q. And in your conversations with Mr. Huprich prior to Two Men and a Truck, International, bringing this lawsuit, he had never indicated to you that the Notice of Termination was defective?

A. To the best of my recollection, never until the complaint was answered.

Q. And prior to starting the lawsuit, did he discuss with you that he needed 10 calendar days. You terminated us too soon?

A. To the best of my recollection, he never did that until he filed the answer to the --

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MR. HUPRICH: I sort of — I object on the grounds of relevancy.

What I said before, a lawsuit was filed or things like this, isn't relevant to any issue before the jury.

THE COURT: Well, it said and done. Move on, please.

BY MR. ALEXSY:

Q. Let me show you Defendant's Exhibit #107, again, which is, I believe, Mr. Huprich's letter to you of November 4th, is that it?

A. That's correct.

Q. He's stating you have a certain misunderstanding with regards to conversations he had with you?

A. Right.

Q. Or mischaracterizations, correct? You misunderstood the conversations?

A. I don't believe I did.

The letter that he made reference to in the September 26, 1994 termination letter, he asked me to read it.

The letter says: Based upon communication directed to our counsel from your attorney, Donald Huprich, based on my conversation with Mr. Huprich on September 23, wherein the whole conversation was we want out of the system.

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I mean, again, my prospective having been before, we were trying to get this Ryder deal done, get it test marketed. And all of a sudden this attorney calls me, says, we want out of the system.

I've been in franchising for a long time. When people get out of the system, they're not going to sign an addendum that says we're staying in the system.

That's the conclusion I drew as a result of Mr. Huprich's letter.

So that's why the letter of the 26th says based upon the communication directed to our counsel from your attorney.

MR. ALEXSY: I've no further questions.

MR. HUPRICH: No questions, Your Honor.

THE COURT: Thank you. Step down.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EXCERPTS OF TRIAL TRANSCRIPT

(February 20, 1997)

* * *

[p. 297]

Q: In Plaintiff's Exhibit #10, would you please tell the jury the one and only one thing that you told Two Men and a Truck/Flint that it had to stop in order to cure?

A: As I recall what it had to do was sign an addendum to the franchise agreement allowing them to be a Ryder Dealer.

Does that answer your question?

Q: No wasn't there something that they could stop in order to cure?

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A: Oh. Stop providing Ryder services.

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EXCERPTS OF HEARING ON DEFENDANTS' MOTION IN LIMINE

(February 18, 1997)

* * *

[p. 35]

MR. HUPRICH: Okay.

Your Honor, the next motion *in limine* is a very troubling and thorny issue for the Court. And this motion is to exclude Mr. Raymond as a witness. And when we appeared for the pretrial conference, I hope Your Honor remembers, Mr. Raymond says he decided for the first time he needed to be a witness after the plaintiff's motion for summary judgment had been denied.

THE COURT: Let me ask now. Mr. Raymond, are you planning to testify in this case?

MR. RAYMOND: Yes, Your Honor, I am.

THE COURT: Well, then I must say you are disqualified as counsel.

MR. RAYMOND: That's fine, Your Honor. Mr. ALEXSY is the one who's trying this case on our behalf anyway.

I think under the rule — I think under the rules, Your Honor, I could act as counsel and be a witness,

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but as my brief indicates, Your Honor, if, in fact, the Court believes that's not appropriate, then I will withdraw as counsel. And if you disqualify me, obviously, I cannot act as counsel.

THE COURT: You are disqualified.

MR. RAYMOND: Thank you, Your Honor.

MR. HUPRICH: Your Honor, still not besides that Mr. Raymond's disqualified as counsel, though I'm troubled by the issue that he's going to be permitted to testify.

As I understand and he has refused so far to basically disclose what he intends to fully say; I've asked him repeatedly.

And his letter which we have filed in response back to the Court basically says he intends to testify about his opinions and conclusions that he drew from facts that are undisputable and will be up to the jury to decide whether the conclusions he drew were reasonable. That doesn't tell me much about his testimony.

Now there's been — it's best I can figure it out, I think what Mr. Raymond wants to do is get up on that witness stand and say is that ahead of the termination, the defendant that's a franchisee had me call up and speak to Mr. Raymond and tell Mr. Raymond that the franchisee was no longer going to perform under the franchise agreement. That's one version we've heard out of his client, Ms. Bergeron, in a letter she has written that plaintiff intends to introduce as evidence.

Another version is that I said that something about the franchisee was not going to sign a proposed addendum.

Now I would dispute that. I didn't even know anything about this proposed addendum at that point in time.

But Mr. Raymond is apparently wanting to get up and testify in advance of the termination, there was some sort of repudiation through oral words of me, even though the demand for arbitration that was subsequently filed and before this litigated started, doesn't say the franchisee's not going to perform.

But what it looks like to me is an effort to cover for an improper termination because there was a cure, because there was an inadequate amount of time to cure, *et cetera*.

I don't need to go through all the reasons, but now Mr. Raymond wants to turn this into a swearing match between what I said to him and what he interpreted that to mean and put my clients in this awkward position. That is, that I would be trial counsel, cross examining Mr. Raymond regarding what I supposedly said to him on a very critical

issue in the case.

THE COURT: Now what does he say you said to him again?

MR. HUPRICH: I've heard different versions. He won't tell me what his testimony's going to be. The versions I have heard --

THE COURT: You've never taken his deposition?

MR. HUPRICH: Didn't know he was going to be a witness, Your Honor.

THE COURT: Go ahead. What's he's going to say that you said?

MR. HUPRICH: I don't know, he won't tell me. The versions I've heard to this point in time are that I supposedly said the franchisee was not going to perform.

THE COURT: All right. Go ahead.

MR. HUPRICH: He may say I supposedly said the franchisee was not going to sign the addendum or that's the understanding based upon the conversation because I said that the franchisee was going to file a demand for arbitration unless we're asking for a tolling agreement because we didn't have a statute of limitation problems which the franchiser

refused to give, so a demand for arbitration wound up being filed. I don't know exactly what Mr. Raymond is going to say.

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THE COURT: That doesn't make the termination appropriate, whatever you might have called and said.

MR. HUPRICH: Well, I think what they want to try to do, Your Honor, and argue to the jury, oh, it didn't matter. We didn't have to comply with the franchise agreement because, you see, Mr. Huprich, you see him over there, the ones that's been talking to you, he called up and said bad things. And where is Mr. Huprich to testify and denied that and rebut that?

Now originally they had even me listed as a may call witness. Now in their reply on motions *in limine*, we won't call Mr. Huprich, but defendants may have to.

Well, this seems to me to be highly unusual, very prejudicial to the defendants to have an attorney being — withdrawing and then getting up onto the witness stand. They indicate --

THE COURT: Well, when you cross examine him, you can say didn't you just withdraw when we started trial.

I'm going to deny this motion and let him do it. Mr. Raymond, you can't sit there at counsel table either if you're withdrawing.

You really must remove yourself from sitting at counsel table on your client's behalf. You're conveying to

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the jury, still vouching for your position in the case. So you have to be away from all participation.

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MR. HUPRICH: Number four is to exclude any evidence that the preliminary injunction was entered or sought in this case, to be excluded on the grounds of relevance and unfair prejudice outweighing probative value.

As Your Honor's well aware, a preliminary injunction is just that, it's preliminary.

The jury is going to be the finder of fact. I believe that — maybe I didn't do a good job of explaining the facts to Your Honor with respect to this particular case.

We had consolidated cases, one of them didn't have any of these types of defenses that defendant Fernsler has, I'm sorry, defendant Two Men and a Truck.

And Your Honor entered a --

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THE COURT: But listen. There's a problem here because your damages you're going to say were done from not having the phone number.

Aren't those things that I ordered?

MR. HUPRICH: Yes, Your Honor. And the way we think that should be handled is simply that the — because if the jury's told about a preliminary injunction having been entered, then the jury's quite likely to draw a conclusion that Your Honor's already looked at the evidence, all of the evidence and reached a conclusion that the defendants are in the wrong. And that would, I think, unfairly prejudice the defendants under these circumstances.

The fact that an injunction, preliminary injunction was entered, and was a factor, a causative factor is in the telephone numbers being assigned and in the name no longer being used, I think, can be handled by simply that the defendants eventually, as a result of the purported termination of the franchise agreement, were assigned a telephone number and quit using the mark.

I don't think there has to be any further — because that's true. If, if the franchiser hadn't attempted to terminate, had not planned to terminate the franchise agreement, Your Honor would have never entered the preliminary injunction and the name never would have

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stopped being used and the telephone numbers would have been assigned.

If we can't do it in that fashion, then it seems to me that I would like to propose, on behalf of defendants, a cautionary instruction to the jury which has not yet been

drafted, because I didn't contemplate this until just, now informing the jury that a preliminary injunction is — doesn't indicate the judge's opinion, it was preliminary; it may have been based upon evidence other than what this jury is hearing, something along those lines.

THE COURT: I think it has to be, but I don't think I can exclude it. Maybe a cautionary instruction that it was granted on petition of plaintiffs after a one hour hearing.

Or you can — if it comes up, you can use all of that in examination, too, bring it out so you can argue it.

Did the court hear any testimony?

MR. HUPRICH: No, Your Honor.

THE COURT: How long was the hearing?

MR. RAYMOND: For the preliminary injunction?

THE COURT: Yes.

MR. HUPRICH: For the preliminary injunction?

For three different franchisees, two cases consolidated, I believe it was less than about an hour.

THE COURT: That can be brought out. And the court can't say and after all what happened was this, that and the other.

You have to bring out what happened and I'll give a mild cautionary instruction that, as you have heard, preliminary injunctions are granted on lesser showings and so forth.

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MR. HUPRICH: Number eight is that plaintiffs should be prohibited from calling me as a witness. I believe that they have now agreed they're not going to do so.

But it does sort of bring us back into this whole issue Mr. Raymond wants to say about the conclusions he drew as a result of what I said, which puts us back in the awkward position of defense counsel being on trial instead of the parties to the litigation.

MR. ALEXSY: I would agree it's awkward. I would say this.

The defendants have listed their attorney Mr. Mattis on their witness list. I assume that they produce Mr. Mattis to talk about the sales types of things which Mr. Raymond talked about and Mr. Huprich may have to testify to as to this conflict into whether or not --

THE COURT: Wait a minute. You're saying you do --

MR. ALEXSY: I don't intend to call him in

our case in chief, it may come up in rebuttal.

THE COURT: You may call him.

MR. ALEXSY: Yes, Your Honor.

THE COURT: For what?

MR. ALEXSY: The key issue here is, is the termination proper. And there are these series of events which go on in a two-week period where Mr. Mattis and Huprich don't know what each other are doing.

THE COURT: So what?

MR. ALEXSY: My client is making an estoppel argument that we rely on certain statements which Mr. Huprich has made to Mr. Raymond in terms of rescission or potential rescission in that they have repudiated the agreement.

We draw two conclusions from that. One is, they are not going to cure under our notice of termination.

We draw another conclusion for that, based upon Mrs. Fernsler's failure then to report sales or pay royalties. There is no need to send out another notice of terminations because they consider themselves terminated.

THE COURT: After they got a notice of termination.

MR. ALEXSY: Well, again, that's what has to be hashed out here. There are calls and letters going back and forth in a two-week period which my clients rely on in

[p. 54]

taking or not taking certain further actions.

MR. HUPRICH: Your Honor, may I add a couple brief comments?

THE COURT: Right. I don't understand this calling defense counsel as a witness. I don't know.

Go ahead. What is your response?

MR. HUPRICH: Two things.

One, the plaintiff agrees this is awkward that they're going to be saying I said things. He's admitting there's prejudice that Mr. Raymond is going to get to testify as to what I supposedly said.

Number two, we've now heard the theory of their case is they know they were wrong. It is this.

Now it is the franchise agreement was repudiated by the franchisee in advance of the notice of termination by what I said orally.

Your Honor, this is a brand new claim theory by the defendant as a basis for being able to recover and being able to terminate the franchise agreement.

They have plead in three complaints the one and only reason that the franchiser terminated the franchise agreement was that Two Men and a Truck/Flint continued to operate a Ryder Rental Truck business.

THE COURT: Don't they write a letter? Aside from what happened in this lawsuit, didn't they send a letter saying we're terminating because of this or that?

MR. HUPRICH: Yes. And --

THE COURT: This is not it?

MR. HUPRICH: This is not it, but the franchiser wants to make this argument and confuse the jury and me plea on trial through Mr. Raymond's words on the witness stand instead of what the case is really about which is, what did the franchiser write and do.

THE COURT: Right. So you'll have to bring all that out.

MR. HUPRICH: But what I'm seeking, though here, is that they can't call me a witness, that they're prohibited from calling me as a witness and now because he's just said the whole reason he wants to call me in rebuttal is because he may have to call me to testify about the repudiation statements I supposedly made.

But this franchiser did not plead that the franchisee repudiated the contract in advance of the notice of termination, that's not the basis for this lawsuit and they're trying to add a new claim at the eleventh hour, I should say 10:20 on just a little bit before jury selection.

THE COURT: I can't believe this is any genuine plan. This is to keep some turmoil going. Because why in the world would you call your great opponent through a complete trial at the end of it to say what are you doing to yourself. Even I cannot believe how it would even suit and he's going to say yes, I repudiated.

MR. ALEXSY: I don't know how the testimony's going to come in in terms of what points we be brought up by Mr. Huprich. I don't know that, so I can't tell you Your Honor I'm not going to call Mr. Huprich.

We've plead estoppel and waived as affirmative defenses to the counter claim. We're saying you are estopped from claiming you were properly terminated. You took certain actions.

THE COURT: That doesn't mean you repudiated.

MR. ALEXSY: You are estopped from denying that you are properly terminated. You took affirmative actions with regard to us and saying you want out of the franchise system and based on our reliance on those actions, when you stopped paying royalties, we did not send you another notice.

THE COURT: Another notice? We send you one for a completely different reason.

MR. ALEXSY: You terminated as a result.

THE COURT: Well, you may not call opposing counsel as a witness even in your rebuttal case. I hate to enter this order because it adds something for potential

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appeal. I don't know why you just can't rest on — I'm not making any order. We'll decide.

* * *

APPENDIX G

FEDERAL RULES, RELEVANT STATUTES AND OTHER AUTHORITIES

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

15 U.S.C. § 1117(a)

(a) When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation under section 43(a), shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 32 and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may, in its discretion, enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

FEDERAL RULE OF CIVIL PROCEDURE 1

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They will be construed and administered to secure the just, speedy, and inexpensive determination of every action.

FEDERAL RULE OF CIVIL PROCEDURE 26(a)(5)

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes, physical and mental examinations; and requests for admission.

FEDERAL RULE OF CIVIL PROCEDURE 26(e)(1)

(e) Supplementation of Disclosures and Responses.

A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include the information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

FEDERAL RULE OF CIVIL PROCEDURE 37(c)(1)

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

FEDERAL RULE OF CIVIL PROCEDURE 50(a)(1)

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

FEDERAL RULE OF EVIDENCE 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

FEDERAL RULE OF EVIDENCE 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FEDERAL RULE OF EVIDENCE 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FEDERAL RULE OF EVIDENCE 801(a), (b), and (c)

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

FEDERAL RULE OF EVIDENCE 802

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Supreme Court, U.S.
FILED
AUG 19 1999
OFFICE OF THE CLERK

No. 99-146

IN THE

Supreme Court of the United States

PAMELA E. FERNSLER, *et al.*,

Petitioners,

v.

TWO MEN AND A TRUCK INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Two Men And A Truck International, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

This Petition asks the Court's review of a Sixth Circuit opinion affirming a jury verdict for trademark unfair competition and breach of contract decided in RESPONDENT's **TWO MEN AND A TRUCK®/** INTERNATIONAL, INC.'s ("RESPONDENT") favor. The Court of Appeals issued its opinion on December 17, 1998 and denied Petitioners' Motion for Rehearing on April 21, 1999. The Court of Appeals opinion is NOT RECOMMENDED FOR FULL-TEXT PUBLICATION per 6th Cir. R. 206 and 6th Cir. I.O.P. 206. In light of the criteria required for publication under the Sixth Circuit's Rule 206, one can reasonably conclude that the Court of Appeal's panel determined that this case:

(1) did not establish a new rule of law, or alter or modify an existing rule of law, or apply an established rule to a novel fact situation;

(2) did not create or resolve a conflict or authority either within the circuit or between this circuit and another;

(3) did not consider legal or factual issues of continuing public interest; and

(4) did not address a lower court or administrative agency decision that has been published of which this panel was aware.

No Court of Appeals panel is bound by the rulings in this case when deciding future cases, because it has not been recommended for publication. *See* 6th Cir. R. 206.

For reasons described below, there is no compelling reason for this Court to review the Court of Appeal's decision in this fact-bound case.

A. Flint's And Fernsler's Breaches Of Contract

RESPONDENT is a franchisor and operates a franchise system that provides moving and related services using its **TWO MEN AND A TRUCK®** service mark and business operating system throughout the United States. Presently there are approximately 70 **TWO MEN AND A TRUCK®** franchise locations.

A 1990 franchise agreement ("Contract") between RESPONDENT and Petitioner Michigan Moving Company, f/k/a Two Men and a Truck/Flint, Inc. ("FLINT") authorized FLINT to use RESPONDENT's **TWO MEN AND A TRUCK®** service mark and business operating system to operate FLINT's moving business in Genesee County, Michigan. FLINT was one of RESPONDENT's best franchisees during its nearly 4 years in the **TWO MEN AND A TRUCK®** franchise system.

In February 1994, unbeknownst to RESPONDENT, Petitioner Pamela E. Fernsler ("FERNSLER"), President of FLINT, signed a Ryder Truck Dealer Agreement as "Two Men and a Truck" on behalf of FLINT. A May 1994 newspaper article stated that FLINT's "Two Men and a Truck is a new Ryder Truck Rental Dealer" and "Two Men and a Truck will rent Ryder trucks locally." When RESPONDENT learned of FLINT's plan to sell Ryder services from its **TWO MEN AND A TRUCK®** franchise location, RESPONDENT was upset and concerned because FLINT's operation of a Ryder rental truck business violated several provisions of

the Contract. RESPONDENT sent a letter to FERNSLER in May 1994 telling her that the operation of the Ryder rental truck business violated the Contract, Articles II(3) regarding Approved Services, III(4) regarding Manner of Using the Marks, and III(7) regarding Permitted Business Name. The letter required FLINT to stop operating the Ryder business from the FLINT'S **TWO MEN AND A TRUCK®** franchise location. Soon after receiving the letter, FERNSLER told RESPONDENT's President Melanie Bergeron that she [FERNSLER] didn't think that operating the Ryder rental truck business from her **TWO MEN AND A TRUCK®** franchise business was a big deal, but acknowledged that she should have gotten written authorization to do so.

RESPONDENT's growing system wanted to keep a good franchisee like FLINT in the system. Furthermore, RESPONDENT thought FLINT could test-market Ryder rental truck services for possible use throughout the entire **TWO MEN AND A TRUCK®** system. With this in mind, RESPONDENT suggested that FLINT could test-market the Ryder rental truck business, subject to the terms of a Contract addendum to be drawn to authorize the test-marketing. This was a satisfactory solution for all parties, and RESPONDENT sent a letter confirming this understanding to FLINT and FERNSLER. RESPONDENT's letter noted that once FLINT signed the addendum to test-market the Ryder concept, RESPONDENT would look forward to watching FLINT grow with the new concept. RESPONDENT sent a test-market addendum and cover letter to FERNSLER, asking her to sign it, or to call if FERNSLER had questions about it. Despite the letter, FERNSLER did not communicate with RESPONDENT, or return the signed addendum.

On September 2, 1994, RESPONDENT wrote to FERNSLER to inquire why she hadn't communicated with RESPONDENT or returned the signed addendum. FERNSLER did not respond. RESPONDENT's President called FERNSLER, but FERNSLER was not available and did not return the calls. Finally, sometime later in September 1994, RESPONDENT's President was able to reach FERNSLER via telephone. FERNSLER told RESPONDENT's President that her [FERNSLER's] attorney, unknown to RESPONDENT at that time, told her not to talk to RESPONDENT and not to sign anything.

On September 23, 1994, RESPONDENT's legal counsel, Steven M. Raymond ("Raymond"), sent a letter to FERNSLER informing her that: (1) FLINT was violating the Contract, Articles II(3), III(4) and III(7) because of FLINT's operation of the Ryder rental truck business; (2) FLINT could cure the violations by signing the test-market addendum sent to FERNSLER; and (3) if the matter wasn't amicably resolved within 7 days, then legal action would be taken to terminate FLINT's **TWO MEN AND A TRUCK®** franchise. Coincidentally, on the same day Raymond sent this letter to FERNSLER, FLINT's legal counsel, Don C. Huprich ("Huprich"), called and introduced himself to Raymond. He represented to Raymond that RESPONDENT committed disclosure violations when it sold the **TWO MEN AND A TRUCK®** franchise to FLINT some four years before. As a result of these alleged disclosure violations, Huprich said he intended to take action to get FLINT out of the **TWO MEN AND A TRUCK®** franchise system, but wanted to do so without litigating. He sought an agreement from Raymond to extend (toll) the 4-year statute of limitations on FLINT's alleged disclosure violation claim, since the 4-year statute ran out on September 26, 1994, three

days hence. Raymond would not agree to toll the statute of limitations because it was not in the best interest of his client, telling Huprich to take whatever action he thought necessary.

The following Monday, September 26, 1994, FLINT filed a Demand for Arbitration seeking a declaration that FLINT could cease operating as a **TWO MEN AND A TRUCK®** franchisee, while retaining the right to use RESPONDENT's **TWO MEN AND A TRUCK®** service mark. It being apparent that FLINT had no intention of signing the Ryder test-market addendum, RESPONDENT sent FLINT a letter on September 26, 1994 of its intent to terminate FLINT if it did not cure its violation of operating an unauthorized Ryder rental business. A week later Raymond received a letter from Huprich, stating that FLINT intended to leave the **TWO MEN AND A TRUCK®** franchise system.

Incongruously, two days after Huprich's letter, Raymond received a letter from another attorney representing FLINT, Dale Mattis, which letter said that FLINT had written to Ryder and advised Ryder that FLINT would no longer operate a Ryder rental truck business. Contrary to Dale Mattis' representation in this letter, FERNSLER testified at trial that FLINT did not write to Ryder, but told it verbally of FLINT's intent to stop operating a Ryder rental truck business. Confused as to FLINT's intent [Attorney Huprich taking action to get FLINT out of the **TWO MEN AND A TRUCK®** system, and Attorney Mattis giving notice of FLINT's alleged intent to cure a violation to stay in the **TWO MEN AND A TRUCK®** system], RESPONDENT physically observed FLINT's franchise location on October 6, 1994 and discovered that FLINT was still displaying a Ryder sign. FLINT was also continuing to answer the phone

as a Ryder rental truck business. The same day, RESPONDENT's legal counsel, Raymond, wrote via facsimile to attorney Dale Mattis informing him that FLINT had failed to cure its violations. Mattis never responded. On the same day, Raymond also telephoned Huprich, and let him know of the Ryder situation. Huprich said he would inform FERNSLER, but he never followed up with Raymond on the issue.

On October 10, 1994, FLINT's franchise sales report and royalties and advertising fees were due for the month of September, but were never tendered. FERNSLER testified at trial that she knew FLINT was terminated as of October 10, 1994, and didn't provide any royalty reports or pay any more royalty or advertising fees to RESPONDENT on the advice of counsel. Even so, as FERNSLER admitted at trial, FLINT continued to use RESPONDENT's **TWO MEN AND A TRUCK®** service mark until a court order enjoined FLINT from using it in April, 1995.

RESPONDENT filed this action in November 1994. Several months later, RESPONDENT learned that FERNSLER had secretly incorporated a new corporation, Petitioner P.E.F., Inc. ("PEF"), for the sole purpose of operating the Ryder rental truck business from FLINT's **TWO MEN AND A TRUCK®** franchise location. PEF was incorporated on October 5, 1994, the very day FLINT said it had stopped operating a Ryder rental truck business. Incredibly, FERNSLER testified at trial that she did not believe it "relevant" or "worth sharing" with RESPONDENT that she had incorporated PEF for the purpose of operating a Ryder rental truck business from FLINT's **TWO MEN AND A TRUCK®** location, despite FERNSLER'S prior promise that FLINT would sign a Ryder test-market agreement to

test the concept within the **TWO MEN AND A TRUCK®** franchise system.

B. PEF's Liability For Unfair Competition

FERNSLER admitted that PEF's start-up was funded using proceeds generated from FLINT's business. She also admitted FLINT paid the rent for the entire business premises, including the area the PEF business allegedly occupied. Finally, the evidence showed that PEF, through actions of FERNSLER, answered its phone as "Two Men and a Truck." The evidence demonstrated that PEF was nothing more than a sham corporation. FERNSLER incorporated it to fraudulently run Ryder sales through it to avoid obligations under the Contract.[1] FERNSLER's secretive and fraudulent actions were especially egregious, because she had already admitted FLINT's contractual obligation to obtain written authorization before selling Ryder services from FLINT's **TWO MEN AND A TRUCK®** franchise location. PEF's liability for unfair competition arose as that of a joint tortfeasor, and as a party defendant who impeded RESPONDENT's calculation of actual damages.

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1. Despite Petitioners' claim at trial that PEF, not FLINT, was operating the Ryder rental truck business after October 6, 1994, Ryder was still sending checks to "Two Men and a Truck/Flint" in connection with Ryder services provided by Petitioners as late as February 1995.

REASONS FOR DENYING THE WRIT

I. PETITIONERS RECEIVED AMPLE NOTICE OF RAYMOND APPEARING AS A POTENTIAL WITNESS.

Petitioner filed a Motion in *Limine* on the eve of trial to, among other things, exclude RESPONDENT's legal counsel, Raymond, as a potential fact witness in the case, because he allegedly was not timely disclosed in interrogatory answers. In response, RESPONDENT noted that all deadlines regarding disclosure of witnesses, including Raymond, had been met per the District Court's scheduling orders. Furthermore, and more importantly, Petitioners had known for 1 1/2 years that Raymond was a potential fact witness[2].

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2. For 1 1/2 years Raymond told Huprich that Raymond could appear as a witness. These discussions arose in every instance because Huprich complained that Raymond could not appear as counsel and as a witness. Huprich knew Raymond signed an affidavit dated February 6, 1995 in support of RESPONDENT's Preliminary Injunction Motion. The affidavit related to Raymond's perception of communication with Huprich and Petitioner's other counsel, Dale Mattis. Both Raymond and Huprich submitted affidavits in connection with their Summary Judgment Motions in January and February 1996. On February 7, 1996, Huprich sent Raymond a letter saying that Raymond had to immediately withdraw his affidavits or withdraw as counsel of record and that if Huprich didn't hear from Raymond, Huprich would assume that Raymond planned to continue to be a witness and counsel of record. On March 8, 1996, Huprich sent Raymond another letter, noting that there had been no response to his [Huprich's] February 7, 1996 letter, and that Huprich would bring it to the court's attention at the Summary Judgment hearing. Huprich never brought it to the Court's attention on that day or at any time, until the eve of trial.

(See Appendix C, Exhibit I of the Petition) Finally, Petitioners never filed a motion or otherwise acted to obtain a court order to compel Raymond's testimony, even after Raymond was timely identified as a witness on the Witness List.

When an opposing party knows of witnesses and the scope of their relevant knowledge well before trial, the failure to disclose the witnesses in interrogatories, absent bad faith, is not a basis for excluding the witness' testimony. *Newman v. GHS Osteopathic*, 60 F.3d 153, 156 (3rd Cir. 1995). RESPONDENT did not act in bad faith. It consistently took the position for 1 1/2 years that Raymond could act as legal counsel and a fact witness testifying to certain matters, and timely included Raymond on its Witness List.

On the other hand, Petitioner's counsel's (Huprich's) dilatory tactics wreaked of bad faith. For a year Huprich had told Raymond he could not act as legal counsel and also be a witness, and warned Raymond that if Raymond did not change his position, Huprich would bring the matter to the District Court's attention. Despite this threat, Huprich took no action for more than a year. Finally, on the eve of trial, during the final pretrial conference, Huprich complained for the first time that if Raymond were allowed to testify, he [Huprich] would be required to withdraw as counsel for defendants. (See Appendix C, Exhibit I of the Petition) Thereafter, Huprich brought a Motion in *Limine* to exclude Raymond as a witness, claiming that if Raymond were allowed to testify, Petitioners would suffer unfair prejudice. In the Sixth Circuit, allegations of unfair prejudice are given less weight where the party's attorney engaged in dilatory conduct, as Huprich did here. *Freeland v. Amigo*, 103 F.3d 1271, 1278 (6th Cir. 1997). The District Court denied

Huprich's motion to exclude Raymond as a witness, but disqualified Raymond from continuing as RESPONDENT's legal counsel.

The Court of Appeals affirmed the Trial Court's ruling, stating in its opinion that RESPONDENT's failure to provide proper notice of its intent to call Raymond as a witness was "harmless," so Raymond was not prohibited from testifying under Fed. R. Civ. P. 37. *Two Men and a Truck/International, Inc. v. Fernsler*, 172 F.3d 49, 1998 WL 898864 (6th Cir. 1998).

In its Petition before this Court, Petitioner asserts that Raymond should not have been allowed to testify, because RESPONDENT allegedly violated Fed. R. Civ. P. 26(e), which generally requires supplementation of answers to interrogatories. Supplementation of interrogatories was not necessary in this case, however, because RESPONDENT complied with Fed. R. Civ. P. 26(e)(1) and (2) by otherwise providing the general information to which Raymond testified through direct communication with Petitioners' counsel, Huprich. Furthermore, and as noted by the Sixth Circuit, Petitioners had ample opportunity after Raymond was timely listed on the Witness List to take his deposition or request a continuance, so his deposition could be taken. Petitioners chose to take no action.

Case law cited in the Petition to support the proposition that Raymond should have been excluded from testifying relate to the exclusion of expert witnesses who allegedly *unfairly surprised* the opposing party by raising new theories of liability or damage recovery. *See e.g., Thibeault v. Square D Company*, 960 F.2d 239 (1st Cir. 1992). These cases are inapplicable, because the record showed that *the content of Raymond's trial testimony did not constitute unfair surprise.*

The testimony was generally, if not explicitly, within the knowledge of Petitioners or their counsel.

Petitioners' cited case law[3] is also distinguishable from the instant case, because Raymond testified as a fact or lay witness, not as an expert witness. In each of Petitioners' relevant cited cases, it was the lateness of the disclosure of the expert's report or opinion that gave rise to the unfair prejudice, and which resulted in the trial court's decision to exclude the testimony. However, here, Raymond testified about communications he had with Petitioners or their counsel. Raymond's testimony was generally, if not explicitly, known by Petitioners and/or their counsel. Petitioners had sufficient opportunity to depose Raymond (as the Sixth Circuit noted in its opinion), they cross-examined him at trial, and had the opportunity to present rebuttal witnesses to his testimony.

In addition, the claim of unfair prejudice carries less weight, because the jury was not considering an expert's opinion testimony based on his expert knowledge of subject matters about which jury members were unknowledgeable. *See Licciardi v. TIG Insurance Group*, 140 F.3d 357, 365 (1st Cir 1998). Rather, the jury heard testimony from Raymond regarding factual events understandable to the ordinary person. Jurors could weigh Raymond's credibility as they could weigh any other lay witness' testimony.

Finally, the instant case is distinguishable from Petitioners' cited cases, because the Petitioners in the instant

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3. *Kirstein v. Parks Corporation*, 159 F.3d 1065 (7th Cir. 1998), *cert. den.*, 119 S. Ct. 1456 (1999), *Trost v. Trek Bicycle Corporation*, 162 F.3d 1004 (8th Cir. 1998) and *Salgado v. General Motors Corporation*, 150 F.3d 735 (7th Cir. 1998).

case seek to reverse the District Court's decision to *admit additional testimonial evidence* (i.e. Raymond's testimony), whereas in the relevant cases cited, the appellants sought to reverse trial court decisions *barring additional testimonial evidence.*[4]

In *Dychalo v. Copperloy Corporation*, 78 F.R.D. 146, 148, 2 Fed. Rules Evid. Serv. 1024, 24 F.R. Serv. 2d 1383, *aff'd without op.*, 588 F.2d 819 (3rd Cir. 1980), a case not cited by Petitioners, the trial court permitted the testimony of a witness. After trial, the opposing party filed a motion to vacant the judgment, alleging that the failure to provide supplemental pretrial disclosure regarding the expert witness' testimony caused the opposing party to suffer unfair prejudice when cross-examining the witness at trial. The *Dychalo* court observed that actual notice had been given of the witness' identity, and the opposing party had the opportunity to cure any prejudicial surprise that may have existed by deposing the witness before he gave his testimony at trial. As in the instant case, the opposing party chose not to depose the witness before his cross-examination at trial. *Id.* at 146. The trial court denied the motion, noting that the exclusion of evidence is an "extreme sanction," and the burden of establishing the justification for the exclusion was on the party moving to exclude the testimony. *Id.* at 148, *citing Dudley v. South Jersey Metal, Inc.*, 555 F.2d 96, 99 (3rd Cir. 1977).

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4. Petitioners also cite *Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998), *cert. den.*, 119 S. Ct. 1334 (1999). In *Klonoski* the Court of Appeals reversed a trial court's decision to admit documents that had not been disclosed at any time before they were offered and admitted as evidence. *Klonoski* is inapplicable, because there were no undisclosed documents admitted at trial in this case.

As in *Dychalo*, Petitioners knew that Raymond was a potential witness. Their counsel, Huprich, knew it more than a year in advance of trial. Huprich complained to Raymond that Raymond could not act as legal counsel and also be a witness in the case. He sent Raymond two letters about the issue and threatened a year before trial to bring the matter before the Trial Judge if Raymond did not concede his position. Raymond stood firm in his belief that under the circumstances of this case, he could properly act as RESPONDENT's legal counsel and also testify as a witness. Huprich waited until the final pretrial conference to raise the issue informally before the judge. Then, immediately prior to trial, Petitioner's Motion in *Limine* to exclude Raymond was heard, and denied. Simultaneously, however, the Trial Court disqualified Raymond as legal counsel for RESPONDENT.

Contrary to Petitioners' rhetoric, this was not a "trial by ambush." If Petitioners suffered prejudice because of the Trial Court's decision to allow Raymond to testify, it arose due to Petitioner's counsel's own dilatory tactics.[5] Petitioners had the opportunity to depose Raymond, but failed to do so. Raymond's testimony was consistent with other evidence RESPONDENT presented in the case. There was no unfair surprise.

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5. These dilatory tactics created the circumstances that enable Petitioners' to now disingenuously argue in their Petition that their lead counsel, Huprich, was in no position to rebut Raymond's testimony as a witness, because his clients had already borne the expense of having him prepare for trial and were entitled to "having their counsel of choice." Unlike RESPONDENT, who had only Mr. Raymond as its counsel until trial, Petitioners were also represented throughout the litigation by co-counsel, Matthew Schlegel. Mr. Schlegel was present during the trial, and competent to represent Petitioners.

The decision to permit Raymond to testify under the facts of this case was not a departure from the accepted and usual course of judicial proceedings, and does not require the exercise of this Court's supervisory powers. Nor should this Petition be granted on the theory that the Sixth Circuit's decision in this case is in conflict with other decisions of other United States Courts of Appeal, because the alleged conflicting cases have been distinguished as described above.

Nor should this Court grant this Petition for the purpose of defining the term "harmless" as used in Fed. R. Civ. P. 37(c)(1), or to enumerate factors to consider in determining whether a failure to disclose is "harmless" under that rule. This argument is based on the premise that Raymond was a "non-disclosed witness," (Petition, page 18) which is untrue, as evidenced above.

Furthermore, whether the admission or exclusion of evidence in any given case is "harmless" will be dependent on the unique facts and circumstances of each case. The federal rules are intended to retain flexibility, so that all the facts and circumstances of individual cases may be considered when applying the rules. Trial courts, having first-hand knowledge of the parties and the unique facts and circumstances of each case, are in the best position to establish criteria and determine whether the admission or exclusion of evidence will be "harmless." Under the facts in this case, there is no compelling reason for this Court to grant certiorari to define "harmless" under Fed. R. Civ. P. 37(c)(1).

II. THE ADMISSION OF HEARSAY EVIDENCE, IF ANY, WAS HARMLESS, BECAUSE INDEPENDENT EVIDENCE PROVED PETITIONERS' LIABILITY; FURTHERMORE, NO TIMELY OBJECTION WAS MADE REGARDING IMPROPER FOUNDATION TO EXCLUDE THE ALLEGED HEARSAY.

Petitioners objected to the admission of alleged hearsay evidence, which they claimed gave rise to reversible error. The Sixth Circuit stated, however, that none of the evidentiary rulings at issue caused any harm to the Petitioners, because there was sufficient independently admissible evidence to support the breach of contract verdict. The evidence included Petitioners' fraudulent, on-going effort to sell Ryder rental truck services from the same location as FLINT's **TWO MEN AND A TRUCK®** franchise, through a newly-formed, non-disclosed corporation, PEF, which was financially supported by FLINT. These conspiring and fraudulent acts to surreptitiously sell Ryder rental truck services from the FLINT **TWO MEN AND A TRUCK®** location, by themselves, constituted substantial evidence of Petitioners' intent to breach the franchise Contract.

Petitioners complain that the Sixth Circuit's opinion is erroneous because it said there was a finding that PEF began operating the Ryder dealership on October 5th and Petitioners insist that there was no such finding. As the Court of Appeals' opinion demonstrates, however, there was independent evidence to prove that PEF was operating on October 5th, no matter what Petitioners were willing to admit at trial. In any event, this argument amounts to a claim of erroneous factual findings, which is not a proper basis for granting this Petition,

especially where RESPONDENT prevailed before a jury of its peers pursuant to a general verdict.

Petitioners argued to the Court of Appeals that no proper foundation was laid to establish the alleged hearsay as business record exceptions. However, as RESPONDENT argued in its brief to the Court of Appeals, no such foundational objection was made at trial. If it had been, Petitioners would have objected to the admission of the entire exhibits as failing the foundational test, not merely a portion of each of them as Petitioners argued before the Court of Appeals. Having made no objection as to foundation at trial, Petitioners could not properly seek to exclude the evidence for lack of proper foundation on appeal.

In summarizing their argument for reversing the Trial Court and Court of Appeals based on the admission of hearsay, Petitioners cite no case law to support granting their Petition. Rather, Petitioners baldly speculate that if Attorney Raymond had not been allowed to testify and the alleged hearsay evidence had been excluded, then there would have been no direct evidence of Petitioners' liability, and RESPONDENT's case would have been based on "extremely weak circumstantial evidence." Such speculation fails, by any standard, to constitute the character of the reasons necessary for granting a petition for writ of certiorari.

III. ADMISSION OF THE PRELIMINARY INJUNCTION WAS REASONABLE BECAUSE IT WAS RELEVANT AND DID NOT GIVE RISE TO UNFAIR PREJUDICE OUTWEIGHING THE PROBATIVE VALUE OF THE EVIDENCE; IN ANY EVENT, PETITIONERS SUFFERED NO HARM BECAUSE THERE WAS SUBSTANTIAL INDEPENDENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

Petitioners' Motion in *Limine* filed immediately before trial sought to exclude any evidence of a Preliminary Injunction Order previously entered in the case. The Order enjoined Petitioners from using RESPONDENT's service marks and franchise operating system. Petitioners' Motion in *Limine* asserted that evidence of the existence of the Order was not relevant under F.R.E. 402 and caused unfair prejudice, which outweighed the probative value of the evidence under F.R.E. 403.

RESPONDENT noted in its brief in opposition to the Motion that the injunctive Order was highly relevant because:

a) Petitioners claimed millions of dollars of lost present and future profits in their counterclaim, premised on the theory that the preliminary injunction caused them to lose their business telephone numbers;

b) Evidence of the existence of the preliminary injunction illustrated that Petitioners refused to voluntarily stop using the **TWO MEN AND A TRUCK®** service mark, which Petitioners had claimed was worthless throughout their pretrial pleadings; and

c) Without an express understanding that Petitioners did not voluntarily stop using the trademark and franchise operating system, the jury would likely be confused; it would unfairly and inexplicably be required to guess what occurred in April 1995 to cause Petitioners to stop using RESPONDENT's service mark and business telephone numbers; it could have erroneously guessed that Petitioners voluntarily stopped using them.

The Trial Court denied Petitioners' motion, but noted that a cautionary instruction could be given. Petitioners' counsel stated he would propose such an instruction. However, when the parties and Trial Court met after completion of the proofs to discuss the proposed jury instructions, Petitioners' counsel failed to propose any cautionary instruction, even though both parties had prepared proposed jury instructions for the Trial Court to consider. Nor did Petitioners object that no cautionary instruction was to be given, despite numerous other objections made by Petitioners to the proposed instructions.

Evidence of the entry of the preliminary injunction was central to Petitioners' counterclaim for breach of contract, because Petitioners claimed that imposition of the injunction breached the contract and caused Petitioners to suffer millions of dollars of present and future lost profits. Furthermore, if the jury did not know that Petitioners refused to voluntarily forego the use of RESPONDENT's mark and business phone numbers, then the jury might have logically, but erroneously, assumed that Petitioners voluntarily stopped using the mark when RESPONDENT (per Petitioners' theory) allegedly wrongfully terminated FLINT as a

franchisee. The jury would have been left in a fog, lacking a crucial fact as to the intentions and possible motives of the parties. Thus, the prejudice, if any, suffered by the Petitioners in admitting evidence of the preliminary injunction did not outweigh the probative value of the evidence to establish a clear understanding of the facts.

The Sixth Circuit held that there was sufficient independently admissible evidence to support RESPONDENT's breach of contract claim. It said that the admission of evidence of the preliminary injunction "could not have significantly strengthened a case that was already strong."

Petitioners conclude in their brief before this Court, without citing any law to support their position, that the Sixth Circuit's ruling is erroneous and that there was unfair prejudice created by admitting evidence of the preliminary injunction. Petitioners make no attempt to weigh the alleged unfair prejudice against the probative value of the evidence as required by F.R.E. 403. They simply conclude they were unfairly prejudiced, using as proof the Court of Appeal's statement in its opinion that the Petitioners admitted that PEF began operating the Ryder dealership on October 5th, when Petitioners say it did not. As noted above, evidence of the preliminary injunction was a crucially important fact in Petitioners' proof of its counterclaim and for the jury's full understanding of the parties' intent and motives.

In short, Petitioners have provided no compelling reason for this Court to grant their Petition for a Writ of Certiorari based upon the Trial Court's decision to admit evidence of the preliminary injunction. Substantial evidence independent of the preliminary injunction supported the jury's general verdict in RESPONDENT's favor.

IV. THE TRIAL COURT COULD NOT MAKE FINDINGS OF FACT WHERE THERE WAS SUBSTANTIAL EVIDENCE PRESENTED TO THE JURY FOR IT TO DECIDE ISSUES OF FACT.

Petitioners contend that the Trial Court erred by failing to make certain findings during Petitioners' Rule 50 motion that would have allegedly resulted in the dismissal of RESPONDENT's breach of contract claim before it was submitted to the jury. The Trial Court refused to make such findings, properly leaving the evidence for the jury's consideration. The Court of Appeals affirmed.

In their Petition to this Court, Petitioners say that the Trial Court should have made at least two findings of fact, namely: (1) FLINT did not violate Article III(4) of the Contract and, (2) FLINT did not violate Article III(7) of the Contract. The general jury verdict rendered in this case found FERNSLER and FLINT liable for breach of contract, without stating the specific sections of the Contract they violated.

A. The evidence admitted supports RESPONDENT's claim that FLINT's operation of a Ryder rental truck business violated Article III(4) of the Contract.

Article III(4) of the Contract states in relevant part:

> **Manner of Using Marks.** It is specifically understood and agreed that the Franchisee shall use Franchisor's trade names, marks and logos licensed by this Agreement only in such ways as are permitted by the Franchisor in its operations manual or other written notice . . . [T]he

> Franchisee shall not use its name or any other name not previously approved in writing by the Franchisor in connection with any of Franchisor's marks, trade names or logos.

The following evidence presented at trial proved that Petitioners violated Article III(4):

a. FERNSLER'S admission that FLINT was operating a Ryder rental truck business from its **TWO MEN AND A TRUCK®** franchise location;

b. FERNSLER'S signing of a Ryder Dealer Agreement on February 4, 1994 as "Two Men and a Truck";

c. FERNSLER'S and FLINT's apparent authorization of a newspaper article published on May 12, 1994 stating that "Two Men & A Truck is a new Ryder Truck Rental dealership . . . ";

d. A statement in the local newspaper attributed to FERNSLER, and never denied by her, that she said: "Two Men & A Truck will rent Ryder trucks locally by the day, week or month . . . ";

e. RESPONDENT's May 25, 1994 letter to FERNSLER informing her that FLINT was violating the Contract, Article II(3), III(4) and III(7) by operating a Ryder rental truck business from FLINT's **TWO MEN AND A TRUCK®** location;

f. RESPONDENT's President's uncontradicted testimony that FERNSLER admitted that she should have gotten written authorization before operating a Ryder rental truck business from FLINT's franchise location;

g. FERNSLER's admission that incorporating Ryder rental services in FLINT's **TWO MEN AND A TRUCK®** franchise operation was a "new idea" for the **TWO MEN AND A TRUCK®** franchise system;

h. FERNSLER's incredible testimony that she didn't think it "relevant" or "worth sharing" with RESPONDENT that she had incorporated PEF and that PEF was incorporated for the purpose of operating a Ryder rental truck business from FLINT's **TWO MEN AND A TRUCK®** location, after FERNSLER had already agreed to sign a test-market agreement to test the Ryder rental truck business within the **TWO MEN AND A TRUCK®** system. The jury could have inferred from this secretive and fraudulent behavior that FERNSLER understood she had violated Article III(4), but concocted a plan to try and avoid liability.

This evidence and all legitimate inferences that can be drawn from it, considered in a light most favorable to RESPONDENT, established a *prima facie* case that Petitioners used the RESPONDENT's service marks in conjunction with the Ryder name so as to violate Article III(4) of the Contract. Jurors could have (and did) reasonably

reach a conclusion different than that argued by Petitioners in this case.

B. The evidence admitted supports RESPONDENT's claim that FLINT's operation of a Ryder rental truck business violated Article III(7) of the Contract.

Article III(7) states:

> **Permitted Business Name.** No part of the Franchisor's proprietary marks and trade names nor any words similar thereto shall, without the prior written approval of the Franchisor, be included in any trade name utilized by the Franchisee or by any corporation, partnership or other entity in which the Franchisee may, at any time, have any direct or indirect interest, provided that where required or permitted by applicable law, the Franchisee may register himself as carrying on business using the name indicated in Section C of Exhibit 1 as an assumed or fictitious name.

Based on the evidence admitted and cited in the previous section, Petitioners did not receive written approval to use RESPONDENT's **TWO MEN AND A TRUCK®** mark with the trade name "Ryder", and on its face, such commingling of the two names was a violation of Article III(7). Furthermore, by incorporating PEF and purportedly transferring the Ryder rental truck business to that entity, Petitioners were using an entity in which FERNSLER had a direct interest and FLINT had an indirect interest to enable Petitioners to mix the Ryder name with the **TWO MEN AND A TRUCK®** mark. The commingling of the two names violated Article III(7).

The evidence admitted, and all legitimate inferences that could be drawn from that evidence, when considered in a light most favorable to the non-movant RESPONDENT, established a *prima facie* case that Petitioners violated Article III(7) of the Contract.

Substantial evidence, including the evidence cited above, was presented to the jury for its consideration. The jury found that a preponderance of the evidence supported RESPONDENT's breach of contract claim. The Court of Appeals properly affirmed.

In their Petition before this Court, Petitioners cite *Rowland v. Mad River Local School District*, 730 F.2d 444, 450 (6th Cir. 1984), where the Court of Appeals reversed the trial court for committing "plain error" in an equal protection case, because there was no proof that the plaintiff had been treated any differently than similarly situated employees employed by the defendant school district. Without such proof, the *Rowland* plaintiff had no *prima facie* case to present to the jury. The holding in *Rowland* is inapplicable in this case, however, because there was substantial evidence presented to the jury (including Petitioners' own admissions) to prove Petitioners' violations of the franchise Contract.

Petitioners have generally chosen to ignore the substantial proofs submitted to the jury proving breach of contract. Instead, they have selectively considered portions of the evidence to argue that there was no proof of contract violations to present to the jury (pages 26-28).[6] Significantly,

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6. Petitioners state that the failure to make required findings violated Petitioner's federal "due process" constitutional rights. (Petition, page 26) This argument was not made to the Court of (Cont'd)

despite these arguments, they are compelled to admit in their Petition (page 23) that there is at least "circumstantial evidence" to prove that FLINT breached its Contract by selling Ryder services. In light of this admission, Petitioners assertion that there was no proof of Contract violations is disingenuous and incredible.

V. RESPONDENT PROVED PEF's LIABILITY AND OBLIGATION TO PAY DAMAGES FOR USE OF RESPONDENT'S SERVICE MARK.

The evidence presented at trial proved that RESPONDENT suffered damages due to Petitioner PEF's misappropriation of RESPONDENT's service mark. RESPONDENT's President presented evidence with respect to these damages. The jury awarded RESPONDENT $15,000 against all Petitioners, including PEF, as a joint tortfeasor. 3 McCarthy on Trademarks Sec. 25.23 (12/96 ed.); *see Hard Rock Café Licensing Corp. v. Concession Services*, 955 F.2d 1143, 1150, 21 U.S.P.Q. 2d 1764, 1768 (7th Cir. 1992). The

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(Cont'd)
Appeals, so even if it had validity, it has been waived. In addition, Petitioners cited no law to support the proposition. Unconcerned about these details, Petitioners then leap to the conclusion that the lower courts' failure to make findings (the alleged constitutional error), requires this Court to grant certiorari, unless the so-called constitutional error "was harmless beyond a reasonable doubt." The Due Process Clause does not guarantee citizens perfect judiciary proceedings, as Petitioners' argument implies. Therefore, the alleged failure to make findings in this civil action, does not constitute a violation of the Due Process Clause. Furthermore, using a criminal law standard (proof beyond a reasonable doubt) in a civil case that requires proof by a preponderance of the evidence is illogical and stands the law on its head.

unfair competition damages were doubled as authorized by 15 U.S.C. § 1117(a), because, among other reasons, the Petitioners' misrepresentations and obfuscation about their financial status, made proof of actual damages virtually impossible to calculate. The Court of Appeals affirmed the award, noting that the record reflected that "defendant [Petitioners] impeded the calculation of damages." Where redress requires an under-compensated plaintiff to additional damages and the damage calculations are imprecise and the imprecision results from defendant's conduct, it is appropriate to enhance the damages. *Taco Cabana Int. v. Two Pesos, Inc.*, 932 F.2d 1113, 1127 (5th Cir. 1991), *cert. granted in part*, 502 U.S. 1071, 112 S. Ct. 964, 117 L. Ed. 2d 130 (1992), *aff'd*, 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992).

CONCLUSION

No ruling made by the Court of Appeals in this action is in conflict with any other Court of Appeals decision on an important matter. Nor has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the Trial Court, to require this Court's exercise of its supervisory powers. In short, Petitioners have presented no compelling reason for granting their Petition, and the Petition must be denied.

Respectfully submitted,

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